

RIDER - Supplemental Brief for the United States

(Nos. 1, 2, 4, 8, and 10)

The following should be inserted in the Supplemental Brief for the United States, immediately after the paragraph ending on the top of page 71:

Both bills passed the Senate on May 21, 1866. On that day the Senate considered 18 measures, and passed 10. Of those considered 10 were District bills, 7 of which were passed. There was practically no debate or comment on any of these measures, and no discussion of any of the District bills passed. (Globe, pp. 2706-2723.)

S. 246 (dealing with the school funds) passed the House on July 18, 1866. On that day the House considered 23 measures, passed 9 bills, and concurred in Senate amendments to 11 more. This included consideration of 5 District measures, 4 of which were passed. There was no discussion of any of the District bills passed. (Globe, pp. 3905-3913.)

S. 247 (dealing with the school lots) passed the House on July 27, 1866, the next to last day of the session. On that day the House held a day and evening session. In the evening session, lasting from 7:30 p.m. to 7:50 a.m., it considered 38 measures, and passed 23. There was brief debate on only 8 of the 23 measures passed. The entire "debate" on S. 247 consisted of a question and answer as to the size of the lots. (Globe, pp. 4262-4288.)

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 1¹

OLIVER BROWN, ET AL., APPELLANTS

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE
COUNTY, KANSAS, ET AL.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REARGUMENT

On June 8, 1953, the Court ordered these cases restored to the docket for reargument, and requested counsel in their briefs and on oral argument to discuss certain questions. The order also invited the Attorney General of the United States to take part in the oral argument and to file an additional brief if he so desires.²

¹ Together with No. 2, *Briggs, et al. v. Elliott, et al.*; No. 4, *Dorothy E. Davis, et al. v. County School Board of Prince Edward County, Virginia, et al.*; No. 8, *Spottswood Thomas Bolling, et al. v. C. Melvin Sharpe, et al.*; and No. 10, *Francis B. Gebhart, et al. v. Ethel Louise Belton, et al.*

² The full text of the Court's order is as follows (345 U. S. 972-973) :

"Each of these cases is ordered restored to the docket and is assigned for reargument on Monday, October 12, next. In

Since the United States is not a party to any of these cases and is participating herein solely as an *amicus curiae*, it submits this brief as an objective non-adversary discussion of the questions stated in the Court's order of reargument. No attempt has been made to reexamine other questions briefed and argued at the last term.

their briefs and on oral argument counsel are requested to discuss particularly the following questions insofar as they are relevant to the respective cases:

"1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?

"2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment

"(a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or

"(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

"3. On the assumption that the answers to questions 2 (a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about

I and II

THE CONTEMPORARY UNDERSTANDING OF THE FOURTEENTH AMENDMENT WITH RESPECT TO ITS EFFECT ON RACIAL SEGREGATION IN PUBLIC SCHOOLS

The first two questions asked by the Court are as follows:

1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?

2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance

from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),

"(a) should this Court formulate detailed decrees in these cases;

"(b) if so, what specific issues should the decrees reach;

"(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

"The Attorney General of the United States is invited to take part in the oral argument and to file an additional brief if he so desires."

with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment

(a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or

(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

Since the historical materials examined are relevant to both questions, they are here treated together.³

A. INTRODUCTORY

1. The reconstruction period

Abolition of slavery by national action began while the Civil War was in progress, with Congressional abolition in the District of Columbia (12 Stat. 376) and the territories (12 Stat. 432) in 1862, and President Lincoln's Emancipation Proclamation in 1863. The Thirteenth Amendment, abolishing slavery everywhere within the United States, was proposed by Congress on February 1, 1865, and declared adopted on December 18, 1865.

After the termination of hostilities, new governments were established in the Southern states under Presidential authority. Negroes were not

³ The Appendix, which is contained in a separate volume, consists of detailed factual summaries of the materials on the various aspects of the historical questions which are dealt with in this brief.

allowed, however, to participate in the elections held in these states, and in December 1865 Congress refused to seat members chosen in such elections. At the same session Congress created a Joint Committee on Reconstruction, to which all matters concerning the South were referred and which originated the various measures which formed the program of Congressional reconstruction.

During 1866 Congress, over the opposition of President Johnson, extended the functions of the Freedmen's Bureau, which had been created in 1865 to promote the welfare of the freed Negroes and to protect their civil rights. In April of the same year it enacted over a veto the Civil Rights Act (14 Stat. 27), which was designed to enforce by Federal authority the civil rights of Negroes, including their right to "full and equal benefit of all laws and proceedings for the security of person and property * * *."

Two months later, on June 16, 1866, Congress proposed the Fourteenth Amendment. By March 1867 most of the Northern states had ratified the Amendment. Three border states had rejected it, however, and of the Southern states only Tennessee had ratified it, making a total of less than the required three-fourths. The elections of 1866 had returned to Congress a clear majority in favor of the program of Congressional reconstruction. Accordingly, in March 1867 Congress enacted the Reconstruction Act (14 Stat. 428)

under which the Southern states (except for Tennessee) were divided into five military districts and the existing state governments were declared to be provisional only. The Act provided that military supervision would be withdrawn, and a state's representatives readmitted to Congress, after it had (a) framed a new constitution "in conformity with the Constitution of the United States in all respects," (b) adopted universal male suffrage, and (c) ratified the Fourteenth Amendment. By June 1868 seven states had met all of these conditions and were restored to representation. On July 21, 1868, the Amendment, having been ratified by the legislatures of thirty of the thirty-seven states to which it was submitted, was declared adopted. Subsequently, the other three Southern states ratified the Amendment, and their representatives were readmitted to Congress.

The impeachment of President Johnson in 1868, arising out of his differences with Congress on reconstruction policy, was unsuccessful, but the election of Grant that year brought into office a President who was in agreement with the Congressional program. To assure the Negroes the right to vote, protected by the national government, a third constitutional amendment, the Fifteenth, was proposed by Congress in February 1869 and came into effect in March 1870. In the latter year the Enforcement Act (16 Stat. 140)

reenacted the Civil Rights Act of 1866 and imposed civil and criminal sanctions for violation of rights secured by the Fourteenth and Fifteenth Amendments.

Congress in 1875 enacted a new Civil Rights Act (18 Stat. 335)⁴ declaring that all persons within the jurisdiction of the United States shall be entitled to the "full and equal enjoyment" of the accommodations of inns, public conveyances, theatres, and other places of public amusement, and providing civil and criminal penalties for violations. That Act marked the end of attempts during the reconstruction period to enforce by federal legislation equality of treatment for the emancipated Negroes.

After the determination in 1877 that Hayes had been elected President, the use of Federal authority to support the reconstruction governments in the Southern states ceased.⁵

⁴ This Act was held unconstitutional in 1883 in the *Civil Rights Cases*, 109 U. S. 3.

⁵ An historian has described the settlement of the Hayes-Tilden election dispute as follows: "Generalized, this famous bargain meant: Let the reforming Republicans direct the national government and the southern whites may rule the Negroes. Such were the terms on which the new administration took up its task. They precisely and consciously reversed the principles of reconstruction as followed under Grant, and hence they ended an era." Dunning, *Reconstruction, Political and Economic, 1865-1877* (1907), p. 41; see also Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* (1951); Buck, *The Road to Reunion, 1865-1900* (1937).

2. *Public education in the United States in 1866*

The quarter-century before the Civil War witnessed the initial efforts to establish free, tax-supported public schools throughout the United States.⁶ By 1861 the principle of free public education had become accepted in almost all of the Northern states. Common schools open to all, and supported by general taxation, existed in most of the cities and towns, and in a large number of rural areas.⁷

In the South, however, different conditions prevailed. The essentially rural and sparsely settled character of the region made communication slow and community cooperation difficult. The institution of slavery and the acceptance of class and social distinctions were formidable barriers to the growth of public education. In addition, religious influences tended to encourage the view that education was a parental obligation and not one which the state should assume. Consequently, education in the South prior to the Civil War was left largely to private groups.⁸

Outside of some of the larger cities, such public schools as existed in the South were generally

⁶ Cubberley, *Public Education in the United States* (1919), p. 119 *et seq.*; Knight, *Public Education in the South* (1922), pp. 196-198.

⁷ Cubberley, *supra*, p. 211. A survey of the public school systems in many cities and towns during this period may be found in Barnard, *Special Report of the Commissioner of Education*, H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871), pp. 77-130.

⁸ Knight, *supra*, pp. 264-265.

maintained for the benefit of only the children of the poor.⁹ Even these were disrupted by the war. Teachers and students were called away to other tasks, and the state school funds were diverted to other purposes. At the close of the war the Southern states were faced with the task of completely rebuilding their educational systems.¹⁰ The development of the present-day system of public education did not really begin in the South until the post-war period.¹¹

Although public education was far more advanced in the North than in the South, the conditions in the former region hardly approximated those existing today. The schools were often small one-room affairs where, in rural areas at least, not much more than the three R's was taught. In many states the school term was only three months of a year. Compulsory school attendance was scarcely known. Ungraded schools were common in rural areas, and public high schools were rare. The quality of instruction was generally low, judged by modern standards.¹²

B. THE HISTORICAL ORIGINS AND BACKGROUND OF THE FOURTEENTH AMENDMENT

1. *The anti-slavery origins of the reconstruction amendments*

The constitutional changes of the Reconstruction period, and the civil rights legislation which

⁹ *Ibid.*

¹⁰ *Id.*, pp. 306, 313-317.

¹¹ Cubberley, *supra*, p. 251.

¹² Cubberley, *supra*, ch. VIII, Knight, *supra*, p. 294 *et seq.*

accompanied them, were the culmination of more than thirty years of controversy engendered by the anti-slavery movement. The growth of that movement and the formation of its constitutional philosophy, particularly in relation to the Fourteenth Amendment, have been the subject of several recent historical and legal studies.¹³ These studies show that the conception of the principles incorporated in the Constitution by the Reconstruction Amendments, and the line of their development and growth, are to be found in the long and bitter political and ideological conflict over slavery that preceded the Civil War.

The abolitionists propounded a philosophy of equality expressed most frequently in terms derived from the Declaration of Independence, an equality which implied a duty of government to apply laws impartially to protect the "natural and fundamental" rights of all persons, white and black alike.¹⁴ "Just as the great objection to slavery was its lack of legal protection for slaves, as well as the concomitant, invidious, and discriminatory treatment of free Negroes

¹³ Nye, *Fettered Freedom* (1949); ten Broek, *The Antislavery Origins of the Fourteenth Amendment* (1951); Dumond, *Antislavery Origins of the Civil War in the United States* (1939); Jenkins, *Pro-Slavery Thought in the Old South* (1935); Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, (1950) Wis. L. Rev. 479, 610; Graham, *Procedure to Substance—Extra-Judicial Rise of Due Process, 1830-1860*, 40 Calif. L. Rev. 483 (1953).

¹⁴ ten Broek, *supra*, pp. 7, 96; Nye, *supra*, p. 177 *et seq.*; Dumond, *supra*, pp. 71-73.

and the wholesale public and private invasion of the rights of abolitionists, so the first object of the abolitionists was to gain legal protection for the basic rights of members of all three classes."¹⁵ To gain that legal protection from the governments of the states where slavery existed was a practical impossibility; so the full impetus of the movement was directed towards securing national protection.¹⁶

Against the philosophy of absolute equality before the law, pro-slavery advocates posed the concept of "classified equality among equals."¹⁷ To them, slavery was not a necessary evil but a "positive good," for by relegating a class in society naturally incapable of self-direction to a position legally subordinate to that of a class which was naturally superior and dominant, true equality was possible within each class.¹⁸

The agitation of the anti-slavery forces for absolute equality stimulated numerous efforts to eradicate from the laws of Northern states distinctions based on color; these were regarded as badges of servitude irreconcilable with the equality which was the natural right of all men.¹⁹ An example was the campaign to open the Massachusetts common schools to all, without regard to color. Those schools were tax supported and free,

¹⁵ ten Broek, *supra*, p. 97; see Dumond, *supra*, p. 43.

¹⁶ ten Broek, *supra*, ch. III, IV, *passim*.

¹⁷ Jenkins, *supra*, ch. III *passim*; Nye, *supra*, pp. 185-189.

¹⁸ *Ibid*.

¹⁹ Nye, *supra*, pp. 81-84; ten Broek, *supra*, pp. 42, 54, note 17.

and governed by local boards.²⁰ Some boards yielded to local pressure to abolish segregation; others did not, and efforts were made after 1844 to obtain remedial legislation.²¹ In 1849, after failure of these efforts, an attempt was made to secure judicial invalidation of school segregation. In that year, in *Roberts v. City of Boston*, 5 Cush. (Mass.) 198, Charles Sumner argued before the Supreme Judicial Court that segregation in the Boston common schools was a violation of the state constitutional guarantee of equality, because segregation was in itself a denial of equality.²² He lost the case, but in 1855 the Massachusetts legislature forbade school segregation.

In *Van Camp v. Board of Education of Logan*, 9 Ohio 406 (1859), it was held that mulatto children were not entitled to enter the white common schools. The basic philosophy of the anti-slavery movement was expressed in the dissenting opinion, which declared that "caste-legislation" was inconsistent with the theory of a free and popular government "that asserted in its bill of rights the equality of all men" (p. 415). Twelve years later, Senator Wilson, a leader in the Congressional program of reconstruction, referred to these struggles for Negro access to common schools as an integral

²⁰ Cubberly, *Public Education in the United States* (1919), p. 163 *et seq.*

²¹ Wilson, *Rise and Fall of the Slave Power in America* (1872), vol. I, pp. 495-498.

²² ten Broek, *supra*, p. 54, note 17.

part of the "contest of forty years between liberty and equality on the one side and slavery and privilege on the other" for securing "perfect and absolute equality in rights and privileges" for the Negro.²³

This application of the philosophy of absolute legal equality to invalidate distinctions based on race or color in the Northern states was, however, a side issue. The main objective was complete abolition of slavery, and to accomplish that purpose it was necessary to secure political control of the national government.²⁴ These efforts produced a new national political organization—the Republican Party—established in 1854, and formed specifically to promote anti-slavery objectives.²⁵ Control of the national government by that party after the election of 1860 was the occasion for assertion by the South of the right of sovereign states to secede from the Union to protect their domestic institutions; ²⁶ and control of the national government by that party after the Civil War was the occasion for amendment of the Constitution to embody the principle of "perfect and absolute" equality before the law for which the anti-slavery advocates had so long agitated.

²³ Congressional Globe, 41st Cong., 3d Sess., p. 1061.

²⁴ ten Broek, *supra*, ch. VI.

²⁵ Wilson, *supra*, vol. II, p. 406 *et seq.*; Curtis, *The Republican Party* (1904), vol. I, ch. VI.

²⁶ Dumond, *supra*, pp. 123-126.

2. *The status of Negroes (legal, economic, and educational) at the close of the Civil War*

By 1865 slavery had been ended in fact. In that year it was constitutionally abolished. Emancipation did not, however, make the former slave a free man in all respects. Abolition of slavery did not wipe out at a stroke the "badges of servitude" which had existed for so many generations. The Negro "freedmen" were still commonly regarded as an inferior race. Legally, economically, and educationally, the free colored population was still subject to disabilities not imposed on white citizens, both in the Southern states and, to a lesser extent, in some of the Northern states.

Before the Civil War the states had varied in their treatment of free colored people. Some slave states had required freed Negroes to emigrate; where permitted to remain, they were limited in their rights to contract, hold property, sue, appear as witnesses, and to vote or serve on juries. In some Northern states immigration of free Negroes was prohibited; in many more, the right of suffrage was denied.²⁷

²⁷ Hurd, *Law of Freedom and Bondage in the United States* (1862), vol. 2, pp. 1-218, contains a complete compilation and digest of these laws; and see Barnard, *Special Report of the Commissioner of Education*, H. Ex. Doc. No. 315, 41st Cong., 2d Sess., Appendix, Legal Status of the Colored Population etc., pp. 301-400; Wilson, *Rise and Fall of the Slave Power in America* (1874), vol. II, p. 181 *et seq.*; Stephenson, *Race Distinctions in American Law* (1910), ch. IV. Only in the states of Maine, New Hamp-

At the close of the war, so-called "Black Codes" designed to restrict the freedom of the newly freed colored people were enacted in the Southern states. These Codes contained provisions discriminating against Negroes with regard to such matters as employment and the right to engage in business.²⁸ They were regarded by the majority in Congress as "an attempt on the part of Johnson's reorganized governments to reestablish virtual slavery and thus reverse the result of the war."²⁹

Despite emancipation, the Negroes remained on the lowest economic level. Cut adrift without money or property, they generally remained dependent upon their former owners for employment. The Black Codes only reinforced that dependence.

In the field of education the opportunities of the Southern Negro were far inferior to those of his brother in the North. Long before the war, most of the Southern states had enacted legislation prohibiting the education of all Negroes, free or slave, because of the widespread belief that such education was conducive to rebelliousness.³⁰

shire, Vermont, Massachusetts, and Rhode Island had Negroes received the full right of suffrage.

²⁸ Stephenson, *supra*, ch. IV.

²⁹ Randall, *The Civil War and Reconstruction* (1937), p. 724.

³⁰ Nye, *Fettered Freedom* (1949), pp. 70-71. See the speech of Senator Wilson (Mass.) on April 12, 1860, reviewing these laws, *Congressional Globe*, 36th Cong., 1st Sess., p. 1685.

The few Negro schools were operated clandestinely. It has been estimated that ninety-five per cent of the colored population of the South was illiterate at the time of the Civil War.³¹

After the war ended, the provisional legislatures in the Southern states began to show great interest in the establishment of systems of public school education; yet, with few exceptions, they showed no disposition to extend its benefits to Negroes.³² This reflected the hostility of many people in the South towards the principle of Negro education. The establishment of schools for Negroes was left largely to northern charitable societies, in cooperation with the Freedmen's Bureau. However, the effectiveness of these schools was impaired by the opposition of a considerable portion of the local white population—an opposition which frequently expressed itself in violence, with Negro schools being burned and their teachers, white and colored alike, beaten and expelled from the community.³³

In the North the situation was far different. Nowhere were there prohibitions against Negro education,³⁴ although in five states Negroes were

³¹ Bond, *The Education of the Negro in the American Social Order* (1934), p. 21.

³² *Id.*, p. 41.

³³ *Id.*, pp. 28-32.

³⁴ The only border state which had had such prohibitions was Missouri. By 1865, this prohibition was not only abolished, but Negroes were admitted to public schools. Barnard, *supra*, pp. 359-360. All the following references to

excluded from public schools.³⁵ In some Northern states they were admitted to the same public schools as white children; in others, they were either provided with separate schools, or admitted to the white schools, depending principally upon the number of children involved;³⁶ in still others, they were provided only with separate schools.³⁷ In individual communities in many of the states the practice varied from the state-wide pattern, either by legislative permission or common practice, without legal sanction.³⁸

C. THE LEGISLATIVE HISTORY OF THE THIRTEENTH AMENDMENT AND IMPLEMENTING LEGISLATION

1. *The Thirteenth Amendment*

The legislative history of the Fourteenth Amendment in Congress must begin with a brief account of the Thirteenth Amendment. Both amendments had a common origin and purpose, and were con-

the educational status of the Negro are taken from Appendix, Legal Status of the Colored Population, etc., pp. 301-400, of the Barnard report.

³⁵ Delaware, Maryland, Kentucky, Indiana and Illinois.

³⁶ Pennsylvania and California are examples.

³⁷ See p. 90, footnote 93, *infra*.

³⁸ For example, the Ohio state statutes provided only for separate schools; in the greater part of the state, however, with the exception of Cincinnati, colored children were admitted to the same schools as white children. In Illinois, where there was no provision for Negro public education, the city of Chicago, after an unsuccessful experiment with separate schools during 1864-1865, maintained under its own ordinances a fully integrated system of public schools. On the other hand, New York City and some towns in New Jersey maintained separate schools for colored children. See Barnard, *supra*, pp. 96, 104.

sidered in Congress as related components of an integral plan of reconstruction.

The Thirteenth Amendment originated in the 38th Congress in the form of a joint resolution introduced by Senator Henderson in January 1864. (Congressional Globe, 38th Cong., 1st Sess., p. 145.) The resolution proposed that the Constitution be amended to provide that "Slavery or involuntary servitude, except as a punishment for crime, shall not exist in the United States."³⁹ The proposal was made only after Congressional and executive action had been taken which effectively emancipated the slaves in the Southern states.⁴⁰ In reporting the resolution, Senator Trumbull, chairman of the Senate Judiciary Committee, noted that fact. He stated that the amendment would not only end the institution of slavery but would remove from the Constitution the inconsistency of the founding fathers, who, while proclaiming the equality of all men, nevertheless denied all rights to an entire race (Globe, 38th Cong., 1st Sess., p. 1313). The resolution passed the Sen-

³⁹ Globe, 38th Cong., 1st Sess., p. 1313. The Thirteenth Amendment, as adopted, provides that "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

⁴⁰ The Confiscation Act of 1861, 12 Stat. 319; the Captured and Abandoned Property Act of 1863, 12 Stat. 820; Proclamation (No. 16) of September 22, 1862, 12 Stat. 1267.

ate, but failed of passage in the House (Globe, 38th Cong., 1st Sess., pp. 1490, 2995); and it became one of the principal issues in the 1864 national election.⁴¹

The overwhelming Republican victory that year led President Lincoln in December 1864 to recommend to the lame-duck session of the 38th Congress that the House reconsider its vote (Globe, 38th Cong., 2d Sess., Appendix, p. 3). In January 1865 the resolution was passed by the House by slightly more than the required two-thirds vote (Globe, 38th Cong., 2d Sess., p. 531). It was submitted to the states for ratification in February 1865, and by December of that year a sufficient number of states had ratified. (13 Stat. 567, 774.)

The Congressional debates on the Thirteenth Amendment indicate that its purpose was to make the Negro, so far as law could do so, an indistinguishable element of the general population.⁴² It was the belief of its proponents that by abolishing the institution of slavery they were establishing the constitutional principle of full equality before the law. (Globe, 38th Cong., 2d Sess., pp. 154, 177.) To these men, freedom and equality were coextensive; the one necessarily implied the other. (Globe, 38th Cong., 1st Sess., pp. 1482, 2957; Globe, 38th Cong., 2d Sess., p. 154.) Simi-

⁴¹ McPherson, *Political History of the United States, 1860-65* (1865), pp. 406, 419, 422.

⁴² See, for example, the remarks of Rep. Orth (Globe, 38th Cong., 2d Sess., p. 143).

larly, those who opposed the Amendment did not doubt that the freedom conferred upon the Negro slave included more than "mere exemption from servitude." (Globe, 38th Cong., 1st Sess., p. 2962.) To them, that freedom was a reversal of the "natural and divine" order under which the colored race was inferior and unequal. (Globe, 38th Cong., 2d Sess., p. 150.) This argument proceeded on the basis of their understanding that the Amendment would merge the Negro into the general mass of people on a basis of full legal equality. Those who favored the Amendment did not deny that such was its purpose. (Globe, 38th Cong., 1st Sess., pp. 2957, 2960, 2989; Globe, 38th Cong., 2d Sess., pp. 154, 202, 237.)

2. Implementing legislation: The Freedmen's Bureau bills and the Civil Rights Act of 1866

In the period between the adjournment of the 38th Congress in March 1865 and the convening of the 39th Congress in December of that year, the provisional governments in the Southern states, which had been set up by President Johnson under his "restoration" policy, enacted a series of laws discriminating against Negroes in various ways, the so-called Black Codes discussed *supra*, p. 15. The first session of the 39th Congress, over the veto of President Johnson, enacted two bills to nullify the discriminations created by the Black Codes: (1) the Civil Rights Act of 1866, 14 Stat. 27, and (2) the law which extended the life of the Freedmen's Bureau and enlarged its powers,

14 Stat. 173. It also passed another bill dealing with the Freedmen's Bureau which failed of enactment after it had been vetoed by President Johnson. (S. 60, 39th Cong., 1st Sess.; Globe, p. 943)⁴³ These three bills were expressly intended to give content to the freedom conferred upon the Negro by the Thirteenth Amendment by guaranteeing to him all of the civil rights to which free men were entitled.

These measures were related to the Fourteenth Amendment by more than mere coincidence of time ⁴⁴ and subject matter. As will appear *infra*, pp. 40-45, the latter was proposed after members of the Congress stated that the civil rights guaranteed by statute were vulnerable to future political changes or might possibly be stricken down as unconstitutional. Because the rights intended to be secured to Negroes by these measures were the same as those subsequently embodied in the Four-

⁴³ All references to the Globe in this section are to the Congressional Globe, 39th Cong., 1st Session.

⁴⁴ The Supplementary Freedmen's Bureau bill (S. 60) was debated in Congress from January 11, 1866, through February 20, 1866; the Civil Rights bill, from January 29, 1866, through April 9, 1866; and the second Supplementary Freedmen's Bureau bill (H. R. 613), from May 22, 1866, through July 2, 1866. Meanwhile, the two precursors to the Fourteenth Amendment, the Stevens "apportionment" amendment and the Bingham "equal rights" amendment, *infra*, pp. 33-41, were debated from January 23, 1866, through March 9, 1866, and February 26 through 28, 1866, respectively. Debate on H. J. Res. 127, containing the Fourteenth Amendment as finally proposed, extended from May 8, 1866, to June 13, 1866.

teenth Amendment, it is appropriate to include their legislative history as a relevant part of the background of the Fourteenth Amendment.

(a) Immediately following President Johnson's message of December 5, 1865, stating that existing state law furnished adequate protection for civil rights, the 39th Congress established a Joint Reconstruction Committee to serve as the principal agency for developing the program of "Congressional reconstruction." (Globe, pp. 6, 30, 47.) Senator Wilson immediately brought up for consideration a bill (S. 9)⁴⁵ to nullify the Black Codes. (Globe, p. 39.) He urged Congress to strike down these Codes without delay, so that the Negro freedman

can go where he pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights and guarantees of the good old common law are his, and that he walks the earth, proud and erect in the conscious dignity of a free man * * *. (Globe, p. 111.)

The chief opposition to Wilson's bill came from those Senators who considered all civil rights proposals as an unwarranted effort "to confer on former slaves all the civil or political rights that white people have." (Globe, p. 113.) The

⁴⁵ All bill numbers hereafter cited in this section refer to bills in the 39th Cong., 1st Session.

bill was, however, withdrawn by Wilson because of the evident view of the majority that measures of such a nature required more careful formulation. Senator Trumbull undertook this task. He subsequently introduced two bills which, he stated, would effectively protect all men in those basic rights without which they would not be free. (Globe, p. 43.)

(b) One of the Trumbull bills (S. 60) proposed to extend the life of the Freedmen's Bureau and to enlarge its authority; the second (S. 61) was intended to protect all persons in the exercise of their civil rights and to furnish a means by which those rights might effectively be vindicated. (Globe, p. 129.)

The purpose of S. 60, as stated by Senator Trumbull, was to restrain by military measures any attempt to enforce the Black Codes. (Globe, pp. 319-323.) The bill passed the Senate by a wide majority. (Globe, p. 421.) The opposition centered their attack on the basic concept of equality underlying the bill, and on its military enforcement provisions. (*E. g.*, Globe, pp. 318, 319, 342.) The debate in the House emphasized much the same issues, with the additional matter of education for the freedmen. (*E. g.*, Globe, pp. 513, 585.)

There was little difference in the majority and minority views concerning the bill's scope. Its proponents expressed their understanding that the equality to be enforced did not mean "that all

men shall be six feet high," but rather that they were to have "equal rights before the law," so that it "operates alike on both races" and without "discrimination against either in this respect that does not apply to both." (Globe, pp. 322, 343.) Nor did the opposition indicate any disagreement on that score. They objected, rather, to the general philosophy of the bill. Representative Dawson of Pennsylvania observed that the bill constituted only a part of a broad policy to enforce absolute equality for Negroes so that they

should be received on an equality in white families, should be admitted to the same tables at hotels, should be permitted to occupy the same seats in railroad cars and the same pews in churches; that they should be allowed to hold offices, to sit on juries, to vote, to be eligible to seats in the State and national Legislatures, and to be judges, or to make and expound laws for the government of white men. Their children are to attend the same schools with white children, and to sit side by side with them. (Globe, p. 541.)

Several Congressmen objected to entrusting the Freedmen's Bureau with the responsibility of educating the freedmen because it appeared that the Bureau had taken over certain white schools in the South for the use of Negro children. The charge was made that "unless they mix up white children with black, the white children can have no chance in these schools for instruction."

(Globe, App. pp. 71, 82.) There is no other evidence that any particular thought was given to the question of racial segregation in the existing schools. The bill was passed by the House, but was vetoed by President Johnson in February 1866. (Globe, pp. 688, 915.) The Senate sustained his veto. (Globe, p. 943.)

(c) After the Senate passed S. 60, it turned immediately to consideration of the second of Senator Trumbull's bills, S. 61, the so-called "Civil Rights" bill. (Globe, p. 421.) S. 61 provided (1) that there was to be no discrimination in "civil rights or immunities" among the inhabitants of the United States on account of color, race, or previous servitude, and (2) that all persons, regardless of race or color, were to have the "same" rights to make and enforce contracts, to sue and be sued, to inherit and own property, and to have the full and equal benefit of all laws for the security of person and property. (Globe, p. 474.) Violation of any of these rights "under color of law" was to carry both civil and criminal penalties. (Globe, p. 475.)

The purpose of the bill was stated to be the nullification of all state laws which, on grounds of color or race, deprived "any citizen of civil rights which are secured to other citizens." (Globe, p. 474.) The Senate proponents of the bill explained that the freedom conferred upon Negroes by the Thirteenth Amendment was of little value, unless they were given "some means

of availing themselves of their benefits." (Globe, p. 474.) So long as there were state laws discriminating against the colored people, they remained in part slave. Any statute

which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited. (*Ibid.*)

To the objection that the bill's purpose was "revolutionary", its supporters answered that the country was "in the midst of revolution." (Globe, p. 570.)

The opposition, recognizing that the bill was intended to accomplish "the abolition of all laws in the States which create distinctions between black men and white ones" (Globe, p. 603), objected to this attempt to "place all men upon an equality before the law." (Globe, p. 601.) They claimed that the Thirteenth Amendment did not confer the power on Congress to erase distinctions between Negroes and whites created by state law. (Globe, p. 476.) For them, the Amendment had merely abolished the "status or condition of slavery", and there was no justification for attempting to use it "to confer civil rights which are wholly distinct and unconnected" with such a status. Senator Cowan of Pennsylvania, opposing the bill, referred to the system of racially-segregated schools provided for by Pennsylvania

law as an example of the kind of legal distinction which would be eradicated by the bill:

In Pennsylvania, for the greater convenience of the people, and for the greater convenience, I may say, of both classes of the people, in certain districts the Legislature has provided schools for colored children, has discriminated as between the two classes of children. We put the African children in this school-house and the white children over in that school-house, and educate them there as we best can. Is this amendment to the Constitution of the United States abolishing slavery to break up that system which Pennsylvania has adopted for the education of her white and colored children? Are the school directors who carry out that law and who make this distinction between these classes of children to be punished for a violation of this statute of the United States? To me it is monstrous. (Globe, p. 500.)

No member of the Senate rose to differ with Senator Cowan's view of this objective of the bill. The attacks on the bill failed, however, and it was passed by the Senate in February 1866. (Globe, p. 606.)

In the House the bill was reported favorably by the Judiciary Committee, of which Congressman Wilson of Iowa was chairman. (Globe, p. 1115.) The debate in the House followed the same general pattern as in the Senate.

Mr. Wilson took a more limited view of the objectives and scope of the bill than had his colleagues in the Senate. To him, the general language of the bill did not mean that "all citizens shall sit on the juries, or that their children shall attend the same schools." These, to him, were not such "civil rights or immunities" as were intended to be protected by the bill.⁴⁶ (Globe, p. 1117.)

Those in the House who opposed the bill on its merits vigorously disagreed with Wilson's view that the bill had a limited application, particularly with respect to state laws concerning racial segregation in the schools. (Globe, pp. 1120, 1121, 1270). Congressman Kerr of Indiana argued that the bill would invalidate the school laws of his state:

Again, the constitution of Indiana has dedicated a munificent fund to the support of common schools for the education of the children of the State. But negro and mulatto children are by law excluded from

⁴⁶ Mr. Wilson later pointed out that this view depended not on any general definition of "civil rights or immunities" but upon the form of the bill itself, which, under general rules of construction, would in his opinion have limited the general declaration to the specific and limited rights actually enumerated. (Globe, pp. 1291, 1294.) He thought that the bill could only be construed as relating to matters within the control of Congress, and he had doubt that Congress could constitutionally provide such general protection of civil rights. (Globe, p. 1294.)

those schools. Negroes and mulattoes are exempt by law from school tax. They are denied a civil right, on account of race and color, and are granted an immunity, (from school taxation,) but are taxed for all other purposes. Now, a negro or mulatto takes his child to the common schoolhouse and demands of the teacher that it be admitted to the school and taught as the white children are, which is refused. The teacher then becomes a wrong-doer and is liable to the same punishments, to be administered in the same way; because all the persons referred to would be acting under *color* of some law, statute, ordinance, regulation, or custom. (Globe, p. 1271.)

Congressman Rogers of New Jersey, of the minority, argued similarly with reference to the Pennsylvania schools:

In the State of Pennsylvania there is a discrimination made between the schools for white children and the schools for black. The laws there provide that certain schools shall be set apart for black persons, and certain schools shall be set apart for white persons. Now, if this Congress has a right, by such a bill as this, to enter the sovereign domain of a State and interfere with these statutes and the local regulations of a State, then, by parity of reasoning, it has a right to enter the domain of that State, and inflict upon the people there, without their consent, the right of the negro to enjoy the elective franchise to the same ex-

tent that it is accorded to the white men in that State, * * *. (Globe, p. 1121.)

To Rogers, there was no authority under the Thirteenth Amendment for Congress to interfere in such "domestic" matters; but he plainly understood that the bill under consideration would prohibit segregated schools in the states.

There were some members of the majority who, although supporting the merits of the bill, agreed with the minority that there was doubt that the Thirteenth Amendment empowered Congress to enact such legislation. (Globe, pp. 1290, 1293, 1266.) Led by Congressman Bingham of Ohio, later a principal draftsman of the Fourteenth Amendment, they clearly expressed their understanding that the general language of the bill would "strike down by congressional enactment every State constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen." (Globe, p. 1291.) Congressman Delano of Ohio, a member of this group, pointed out that the bill would clearly apply to state school laws; he cited his own state as an example:

we once had in the State of Ohio a law excluding the black population from any participation in the public schools or in the funds raised for the support of those schools. That law did not, of course, place the black population upon an equal footing with the white, and would, therefore, under

the terms of this bill be void, and those attempting to execute it would be subjected to punishment by fine or imprisonment. (Globe, App. 158.)

Mr. Bingham stated that all laws making distinctions on the basis of color should be eliminated, for the law "should be just"; but he saw the proper remedy for those abuses, "not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future." (Globe, p. 1291.) He agreed that without such amendment the "protection in time of peace within the States of all the rights of person and citizen was of the powers reserved to the States." (Globe, p. 1293.)

The bill was recommitted against Wilson's wishes, largely because of the defection of Bingham and his followers. (Globe, p. 1296.) It was amended in committee to strike out the general language guaranteeing "civil rights or immunities." (Globe, p. 1366.) As Wilson said, that language had been taken by some as warranting a "latitudinarian construction not intended." (*Ibid.*) In this form the bill passed the House, and was concurred in by the Senate. (Globe, pp. 1367, 1416.)

The President vetoed the measure on March 27, 1866. (Globe, p. 1679.) The Senate, after two days' discussion, passed the bill over the veto; the House held no debate, and the veto was immediately overridden. (Globe, pp. 1809, 1861.)

In sum, the Thirteenth Amendment had been proposed as a means of attaining the equality of all men before the law, not as conferring mere exemption from servitude. To its proponents, and to most of its opponents, it would establish the principle that all men should be treated equally. The Civil Rights and the Freedmen's Bureau bills were considered necessary to enforce the equality of freedom guaranteed by that Amendment by forbidding differences in legal treatment on account of race or color. These bills were aimed at striking down state laws which were viewed as restricting the freedom of Negroes by creating or continuing legal distinctions based on race or color. The debates on these bills show that some legislators, on both the majority and minority sides, expressed the view that this principle of equality under law would, if enforced, destroy racial segregation in state schools.

D. THE FOURTEENTH AMENDMENT IN CONGRESS

During the same period that the Civil Rights Act and the first Freedmen's Bureau extension bill were occupying the attention of the 39th Congress, the Joint Committee on Reconstruction was engaged in the study of plans to "reconstruct" the Union on principles that would prevent a recurrence of the recent war.⁴⁷ In the course of that study the Committee originated two

⁴⁷ Journal of the Joint Committee on Reconstruction, Senate Doc. 711, 63rd Cong., 3rd Sess. (hereinafter "Committee Journal").

separate proposals for constitutional amendments which it reported to the floor of Congress. These proposals were: (1) a constitutional amendment reducing the congressional representation of any state which denied citizens suffrage on the basis of race or color (the Stevens "apportionment" amendment)⁴⁸; and (2) a constitutional amendment empowering Congress to enact legislation to guarantee equal rights to all persons (the Bingham "equal rights" amendment).⁴⁹ Both proposals failed. However, after some modification, and with the addition of other proposals, they were included in the "plan of reconstruction" reported by the Joint Committee in April 1866. That plan included the Fourteenth Amendment. (Globe, pp. 2265, 2286.) The discussions of these preliminary proposals in the Congress illumine the scope and purpose of that Amendment and constitute an integral part of its legislative history.

(1) *The Stevens "apportionment" amendment.* The first proposal to be reported was the apportionment amendment. A brief report to the House was delivered by Congressman Thaddeus Stevens on January 22, 1866. (Globe, p. 351.) The amendment had a direct political purpose. It proposed to reduce the congressional representation of a state which excluded any group of citizens from the elective franchise on account of race or color.

⁴⁸ Committee Journal, p. 13; Globe, p. 351.

⁴⁹ Committee Journal, p. 17; Globe, pp. 813, 1033.

The opponents of reconstruction united to condemn this proposal (e. g., *Globe*, pp. 353, 381, 387). However, the usual supporters of reconstruction were divided. To many of the latter, a constitutional provision for apportionment where suffrage was denied on the basis of color might imply that the Constitution permitted legal distinctions to be made on such a basis. (*Globe*, pp. 405, 408.)

Congressman Bingham argued that while the measure was necessary, it was not sufficient standing alone. (*Globe*, p. 429.) It should be accompanied, he said, by

another general amendment to the Constitution which looks to the grant of express power to the Congress of the United States to enforce in behalf of every citizen of every State and of every Territory in the Union the rights which were guaranteed to him from the beginning * * *.

Bingham urged that the American people should adopt both of these proposals in order

to declare their purpose to stand by the foundation principle of their own institutions, the absolute equality of all citizens of the United States politically and civilly before their own laws. (*Globe*, p. 431.)

The split among the majority led to recommittal of the apportionment proposal. (*Globe*, p. 508.) However, the following day it was again reported with an amendment concerning apportionment of

direct taxes, and in this form it passed the House with little discussion. (Globe, p. 538.)

Senator Sumner opened the Senate debate on February 6 with an attack on the proposal. (Globe, p. 673). He said that the freedmen must be fully protected, not by indirection, but by directly "maintaining him in the equal rights of citizenship," including suffrage; and this was impossible "so long as you deny him the shield of *impartial laws*." (Globe, p. 675.) Sumner proposed, instead, a joint resolution to declare, by statute and not by constitutional amendment, the abolition of all distinctions based on color, including those relating to the franchise. (Globe, p. 684.) This was proposed as an exercise by Congress of the authority which he thought it had under the Thirteenth Amendment. Senator Fessenden, Chairman of the Joint Committee on Reconstruction, opposed Sumner and argued the necessity of the apportionment amendment, although admitting his own preference for

a distinct proposition that all provisions in the constitution or laws of any State making any distinction in civil or political rights, or privileges, or immunities whatever, should be held unconstitutional, inoperative, and void, or words to that effect. (Globe, p. 704.)

But he thought that a direct suffrage amendment would probably be too extreme to secure ratification by the states. Senator Yates of Illinois stated that the equality of freedom guaranteed by

the Thirteenth Amendment included both civil and political rights. (Globe, App., pp. 100-101.) By that Amendment, he said, the Negro "became a part of the people" and as such "entitled to the same rights and privileges with all the other citizens of the United States."

Although the proposal received a majority vote in the Senate, it lacked the necessary two-thirds. (Globe, p. 1289.)

(2) *The Bingham "equal rights" amendment.* The second precursor of the Fourteenth Amendment is more directly related to section 1 of that Amendment. It had its origin in two proposals of a similar nature which were placed before the Joint Committee on Reconstruction at its third meeting in January 1866.⁵⁰

The first of these proposals, by Congressman Bingham, provided:

The Congress shall have power to make all laws necessary and proper to secure to all persons in every State within this Union equal protection in their rights of life, liberty, and property.⁵¹

The second, by Congressman Stevens, chairman of the House group of the Committee, was a simpler declaration that

All laws, State or national, shall operate impartially and equally on all persons without regard to race or color.⁵²

⁵⁰ Committee Journal, p. 9.

⁵¹ *Ibid.*

⁵² *Ibid.*

Both were referred to the subcommittee on the apportionment of representatives in Congress, which included Bingham and Stevens.

The following week the subcommittee approved a new draft combining the Bingham and Stevens proposals:

Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property.⁵³

The Committee kept it under consideration until after the apportionment amendment had passed the House. The matter was then referred to a special subcommittee, consisting of Bingham, Boutwell of Massachusetts, and Rogers of New Jersey. The subcommittee reported back a draft very similar to Bingham's original proposal:

Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every State full protection in the enjoyment of life, liberty, and property; and to all citizens of the United States, in any State, the same immunities and also equal political rights and privileges.⁵⁴

The Committee by a tie vote failed to approve this draft, and Bingham proposed a modification which the Committee adopted:

⁵³ Committee Journal, p. 12.

⁵⁴ Committee Journal, p. 14.

The Congress shall have power to make all laws necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty and property.⁵⁵

Bingham reported the proposed amendment to the House on February 26. (Globe, p. 813.)

The proposal was debated for three days and was then postponed. In his report, Bingham stated that the amendment "stands in the very words of the Constitution"; it had theretofore been "the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State * * * to enforce obedience to these requirements of the Constitution." (Globe, pp. 1033, 1034.)

Rogers of New Jersey, a member of the Joint Committee, expressed the view of the minority that the "protection, security, advancement, and improvement, physically and intellectually, of all classes," should be left to the states:

Negroes should have the channels of education opened to them by the States, and by the States they should be protected in life, liberty, and property. * * * (Globe, App., p. 134.)

⁵⁵ Committee Journal, p. 17. It may be observed that each of the proposals, except that of Stevens, provided for exclusive Congressional enforcement.

They should be permitted by the states to do everything white men could do, except to vote and hold office. However, according to Rogers, the amendment would take from the states the power to regulate such personal rights as education:

In the State of Pennsylvania there are laws which make a distinction with regard to the schooling of white children and the schooling of black children. It is provided that certain schools shall be designated and set apart for white children, and certain other schools designated and set apart for black children. Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all the people in the several States shall have equal protection in all the rights of life, liberty, and property, and all the privileges and immunities of citizens in the several States. (Globe, App., p. 134.)

Bingham took the floor again for his proposal, stating:

that no man, no matter what his color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life or liberty or property without due process of law—law in its highest sense, that law which is

the perfection of human reason, and which is impartial, equal, exact justice * * *. (Globe, p. 1094.)

Congressman Hotchkiss of New York, however, said that the provision which authorized Congress to legislate guarantees of equal protection would mean that the degree of protection given could vary as the Congress changed. (Globe, p. 1095.) Equal protection should instead be made a

constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation. But this amendment proposes to leave it to the caprice of Congress * * *. [T]he very privileges for which the gentleman is contending shall be secured to the citizens; but I want them secured by a constitutional amendment that legislation cannot override.

Following this three-day debate, further consideration of the proposal was postponed. (Globe, p. 1095.) This postponement was apparently attributable to the reluctance of the moderate Republican group to give Congress the power to determine the measure of equal protection. The objection that the proposal placed upon Congress the direct responsibility not merely of enforcement but of declaring what rights were to be protected was also voiced by members of the majority in the debates on the Civil Rights bill: what a Republican Congress could give, they feared, a Democratic Congress could take away. The guarantees

of legal equality, to be permanent, therefore had to be made an explicit part of the Constitution.

The majority were determined that the Constitution should not permit any distinctions of law based on race or color, and that it should include express guarantees of equal protection which could not be repealed by any future Congress. The debates on both Stevens' "apportionment" proposal and Bingham's "equal rights" proposal echo the same determination to abolish legal differences based on color or race which had been manifested throughout the debates on the Thirteenth Amendment and its implementing legislation. In the debates on the "equal rights" proposal, the minority repeated their previous argument that to protect equally the civil rights of all persons would destroy racial segregation in state schools. The majority, as before, did not deny that charge but instead continued to discuss equal protection in general terms, without any attempt to enumerate its specific applications.

(3) *H. J. Res. 127: the Fourteenth Amendment*. After the failure of these two proposals, Stevens laid before the Joint Committee in April 1866 a "plan of reconstruction," the core of which was a proposed amendment to the Constitution, containing five sections. Section 1 read as follows:

No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.⁵⁶

⁵⁶ Committee Journal, pp. 28, 29.

Bingham immediately moved to amend this by adding:

Nor shall any State deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation.

The committee rejected Bingham's amendment and retained the original form.⁵⁷ Subsequently, Bingham secured committee agreement to a new section in these words:

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.⁵⁸

This section, which contains the wording of the Fourteenth Amendment as eventually adopted, was substituted for the original section 1, and in that form was reported to both Houses on April 30. (Globe, pp. 2265, 2286.) In the House, as H. J. Res. 127, the proposed amendment was made a special order of business. (Globe, p. 2286.)

(a) *The House debate.* There were but three days of discussion in the House under a rule limiting debate, and much of that time was devoted to Reconstruction generalities and to portions of the

⁵⁷ *Ibid.*

⁵⁸ Committee Journal, p. 39.

proposal other than section 1. (Globe, p. 2433.) From the opening statement by Stevens on May 8, 1866, until he closed May 10, 1866, with the declaration that the Southern states should not return except "as supplicants in sackcloth and ashes," nearly all the radical Republicans in the House echoed his disappointment that suffrage for the Negro was not directly included in the proposed amendment. (Globe, pp. 2459, 2544.) However, Stevens remarked that what was proposed "is all that can be obtained in the present state of public opinion." (Globe, p. 2459.)

The discussion of Section 1 commenced with some brief remarks by Stevens on behalf of the Joint Committee. He affirmed the justice of its provisions:

They are all asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies the defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court

shall allow the man of color to do the same.
(Globe, p. 2459.)

Stevens referred to discriminatory state laws which disqualified Negroes from testifying in courts, and provided different methods of trial or different punishments for them. He did not wish, however, to "enumerate these partial and oppressive laws" at length. But, he said,

Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen. (Globe, p. 2459.)

He anticipated that it would be contended that the "civil rights bill secures the same things." That was only "partly true." Moreover,

a law is repealable by a majority. * * *
This amendment once adopted cannot be annulled without two thirds of Congress.
That they will hardly get. (*Ibid.*)

The arguments which Stevens made for this section of the Amendment do not indicate that, apart from the suffrage provision, he considered there was any difference in substance between the new proposal and his own earlier one (*supra*, p. 36) that "All laws, State or national, shall operate impartially and equally on all persons without regard to race or color."

Congressman Finck of Ohio was opposed to the amendment, but all he said about section 1 was that—

if it is necessary to adopt it, in order to confer upon Congress power over the mat-

ters contained in it, then the civil rights bill * * * is clearly unconstitutional. (Globe, p. 2461.)

Congressman Garfield of Ohio, later President, rose to support the proposal:

The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arises when that gentleman's party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. (Globe, p. 2462.)

The first section, he said, would hold "over every American citizen, without regard to color, the protecting shield of law."

Congressman Raymond of New York, publisher of the New York Times and a conservative Republican who had voted against the Civil Rights bill, undertook to explore the "somewhat curious history" of the "principle" of the first section, "which secures an equality of rights among all the citizens of the United States":

It was first embodied in a proposition introduced by the distinguished gentleman from Ohio, [Mr. Bingham,] in the form of an amendment to the Constitution, giving to Congress power to secure an absolute

equality of civil rights in every State of the Union. It was discussed somewhat in that form, but, encountering considerable opposition from both sides of the House, it was finally postponed, and is still pending. Next it came before us in the form of a bill, by which Congress proposed to exercise precisely the powers which that amendment was intended to confer and to provide for enforcing against State tribunals the prohibitions against unequal legislation. (Globe, p. 2502.)

Even though Raymond had voted twice against the civil rights bill, the principle of which was embodied in the proposed amendment, he stated that he was supporting the latter because he was "heartily in favor of the main object which that bill was intended to secure." All that he wanted was to have this accomplished by constitutional means. (*Ibid.*)

Congressmen Randall of Pennsylvania and Rogers of New Jersey were among the few opponents of the amendment who registered specific objections to section 1. (Globe, pp. 2530, 2538.) Although most of the others objected to reconstruction generally, or to other sections of the proposal, Randall objected because:

The first section proposes to make an equality in every respect between the two races, notwithstanding the policy of discrimination which has heretofore been exclusively exercised by the States, which in my judgment should remain and continue. They

relate to matters appertaining to State citizenship, and there is no occasion whatever for the Federal power to be exercised between the two races at variance with the wishes of the people of the States. (Globe, p. 2530.)

Rogers insisted that "the first section of this programme of disunion" was "most dangerous to liberty." (Globe, p. 2538.) It was, he said,

no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill which * * * was vetoed by the President of the United States upon the ground that it was a direct attempt to consolidate the power of the States and to take away from them the elementary principles which lie at their foundation. (Globe, p. 2538.)

The speeches of Congressmen Bingham and Stevens closed the debate. To Bingham, the need for the first section was "one of the lessons that have been taught * * * by the history of the past four years of terrific conflict." (Globe, p. 2542.) It was to supply the absence in the Constitution of a

power in the people, the whole people of the United States, * * * to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.

This amendment would not take rights properly reserved to the states, for

No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. (Globe, p. 2542.)

Section 1 would carry out the great objectives of the Constitution in protecting persons "by national law from unconstitutional State enactments." (Globe, p. 2543.)

After Stevens' speech, which candidly outlined the partisan political aims of the entire amendment, a vote was taken, and on May 10, 1866, it passed by more than the necessary two-thirds. (Globe, p. 2545.)

(b) *The Senate debate.* In the Senate, the amendment received more extended consideration. It was first brought up May 23, nearly two weeks after it passed the House. (Globe, p. 2763.) Senator Howard of Michigan made the report for the Joint Committee in place of the chairman, Senator Fessenden, who was ill.

Howard explained section 1 in great detail. He said:

This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. * * * It estab-

lishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government. Without this principle of equal justice to all men and equal protection under the shield of the law, there is no republican government and none that is really worth maintaining. (Globe, p. 2766.)

The fifth section of the proposal, he stated, would enable the Congress,

in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment. (Globe, p. 2768.)

Senator Stewart of Nevada spoke generally on the amendment as a plan of reconstruction. (Globe, p. 2798.) He discussed the purposes of section 1 in terms of the conflict between the Congress and the President. Mere restoration of the Southern states on their pre-war footing would, he said, permit them to continue "to apply the theories of slavery to a condition of freedom":

They were educated to believe that a negro was a slave, possessing no rights that a white man was bound to respect, and they believed it still, and they are astonished

at the inconsistencies of the world and its tendency to recognize the rights of man. (Globe, p. 2799.)

However, he did not believe the amendment sufficed in its present form, for to him Negro suffrage was the only definite answer to "slavery and inequality of human rights." (*Ibid.*)

Up to this point, on May 24, the debate had produced a number of proposed revisions, for the most part concerned with other sections of the amendment. (Globe, pp. 2768, 2770, 2804.) With Stewart's speech, it was plain that the majority party was not united on all the aspects of the amendment. Further consideration was postponed for five days, until Tuesday, May 29. Friday, Monday, and Tuesday morning were devoted to a caucus of the Republican members of the Senate.⁵⁰ What was discussed in the caucus, or who proposed the changes agreed to by the caucus, cannot be determined; it is clear, however, that there was great unity thereafter. In fact, opponents found it "hard work to speak" when they knew in "advance that no argument, however just and forcible, and no appeal, however patriotic, can influence a single vote." (Globe, p. 2938.)

Senator Howard, as floor leader, took up the amendment Tuesday, and offered the changes which had been agreed to in caucus. (Globe, p. 2868.)

⁵⁰ James, *The Framing of the Fourteenth Amendment* (1939), pp. 171-172 (an unpublished thesis in the library of the University of Illinois).

The only section 1 change was the addition of a declaration of citizenship as its first sentence:

All persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside. (Globe, p. 2869.)

The purpose of this change was to settle the "great question of citizenship" and to remove "all doubt as to what persons are or are not citizens of the United States." (Globe, p. 2890.)

All of the caucus changes were adopted. (Globe, pp. 2897, 2921.) The renewal of the debates showed marked unity not only in the majority party but also in the opposition. Most of the Senators in that group undertook active opposition—Hendricks of Indiana, Davis of Kentucky, McDougall of California, Reverdy Johnson of Maryland, Democrats; and Cowan of Pennsylvania and Doolittle of Wisconsin, dissident Republicans.

The pattern of opposition was set by Hendricks. (Globe, p. 2938.) To him, the amendment was a matter of partisan politics, a mere "party programme." The whole proposal would centralize "absolute and despotic power" in the Federal government. (Globe, p. 2940.) Senator Davis likewise accused the majority of a "bold and desperate political game." (Globe, App., p. 238.) As to the first section, he said, its

real and only object * * * is to make negroes citizens, to prop the civil rights bill,

and give them a more plausible, if not a valid, claim to its provisions, and to press them forward to a full community of civil and political rights with the white race, for which its authors are struggling and mean to continue to struggle. (Globe, App., p. 240.)

None of the opposition Senators devoted any discussion to specific illustrations of "equality"; they, along with the majority, were more concerned with its general and political implications.

After the caucus, only four of the proponents of the amendment found it necessary to make major speeches, Poland of Vermont, Howe of Wisconsin, Henderson of Missouri, and Yates of Illinois. (Globe, pp. 2961, 3031, 3037, App., p. 217.) Senator Poland was first, and he argued the necessity and justice of reconstruction generally. (Globe, p. 2961.) As to section 1, he declared that its provisions were largely a restatement of those in the original Constitution. Nevertheless,

we know that State laws exist, and some of them of very recent enactment, in direct violation of these principles. Congress has already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the

power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States * * *. (Globe, p. 2961.)

Senator Howe, arguing the necessity of radical reconstruction policies, directed attention to section 1. (Globe, App., p. 217.) His is an important speech, because it went beyond generalities and dealt expressly with the amendment's application to public schools. Howe attacked Senator Hendricks' argument that state rights were invaded by the amendment, for no state had a right to have an "appetite so diseased as seeks to abridge these privileges and these immunities, which seeks to deny to all classes of its citizens the protection of equal laws." (Globe, App., p. 219.) But for Federal intervention, the Southern states would have continued to deny "to a large portion of their respective populations the plainest and most necessary rights of citizenship." As a result of such intervention, he acknowledged that most of those states had granted some basic rights, such as contract, ownership, suit, and the like; but

these are not the only rights that can be denied; these are not the only particulars in which unequal laws can be imposed. (Globe, App., p. 219.)

The single instance of continuing inequality which Senator Howe cited to illustrate the need for section 1 was "a statute enacted by the Legislature

of Florida for the education of her colored people." He analyzed for the Senate the details of the inequality of that statute: First, there was unequal taxation, for

They make provision for the education of their white children also, and everybody who has any property there is taxed for the education of the white children. Black and white are taxed alike for that purpose; but for the education of colored children a fund is raised only from colored men. (Globe, App., p. 219.)

Moreover under the statute there was an insufficient sum provided for Negro education, only about twelve thousand dollars, of which all but \$2,200 was to pay the superintendent of colored schools and the assistant superintendents. Finally, the Negro schools in Florida, he said, could not be satisfactory, since their administration would be subject to the uncontrolled discretion of the superintendents:

Into that school, however, it is worthy of remark that no child can go without permission of the superintendent or his assistant, * * * and the teacher who has paid five dollars for the permission to teach cannot hold that permission a day longer than the superintendent or assistant superintendent see fit to allow * * *. (Globe, App., p. 219.)

Since legislation of this degree of inequality, touching "one of the great interests not only of

this colored population but of the State itself," had been already enacted, Senator Howe asked if there could possibly be hesitation in amending the Constitution to place a "positive inhibition upon exercising this power of local government to sanction such a crime * * *." His speech thus clearly reflects an understanding that school legislation which discriminated against Negroes would be invalidated by the amendment.

Following Howe, Senator Henderson, draftsman of the Thirteenth Amendment, defended the new proposal. (Globe, p. 3031.) He said that the South, after the adoption of the Thirteenth Amendment,

saw its opportunity and promptly collected together all the elements of prejudice and hatred against the negro for purposes of future party power. They denied him the right to hold real or personal property, excluded him from their courts as a witness, denied him the means of education, and forced upon him unequal burdens. Though nominally free, so far as discriminating legislation could make him so he was yet a slave. (Globe, p. 3034.)

He referred explicitly to the anti-slavery origins of the new amendment; to him, the Southern position that the Negro was "inferior to the white man" had caused the war because it came into irreconcilable conflict with the "opposite idea of man's equality * * *, carrying with it equal rights and equal privileges." After the war, it

had become necessary "to consider whether the cause of disease should be removed entirely or be left in the system to fester again." The amendment, he said, was the only way to remove the cause of disease.

Senator Yates likewise expressed the belief that as a result of the Thirteenth Amendment the freed Negro had in law become "one of the people, one of the body-politic, and entitled to be protected in all his rights and privileges as one of the citizens of the United States." (Globe, p. 3037.)

Following some unsuccessful attempts by the opposition to have the sections of the amendment submitted as separate propositions, and to strike out the privileges and immunities clause because it was too vague, the final vote was taken on June 8. (Globe, p. 3042.) The amendment was adopted by a vote of 33-11, more than the necessary two-thirds. (*Ibid.*)

In the House, the amendment was called up by Stevens on June 13, with the statement that the Senate amendments were so slight that there was no purpose in having lengthy discussion. (Globe, p. 3144.) There was a brief debate of a general nature not directed at any specific provisions of the amendment. (Globe, pp. 3144-3148.) That same day, the amendment, in the form in which it had passed the Senate, was approved by the House by a vote of 120 to 32.⁶⁰

⁶⁰ (Globe, p. 3149.) The Fourteenth Amendment, as thus submitted, reads as follows:

E. RATIFICATION OF THE FOURTEENTH AMENDMENT
BY THE STATES

In contrast to the abundance of materials relating to the legislative history of the Fourteenth Amendment in Congress, the available records concerning its ratification by the state legislatures

“SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

“SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

are scanty and incomplete.⁶¹ State legislative debates for the period were not reported, except in Pennsylvania and, in digest form, in Indiana. Official records of state action are limited to the messages of the Governors transmitting the proposed Amendment to the legislatures, often as merely a minor item in the annual message, occasional committee reports, and items entered in the legislative journals.

The Fourteenth Amendment was proposed by Congress on June 16, 1866. It was declared adopted on July 28, 1868, after thirty states had ratified it. During the years 1866 and 1867 it was ratified by twenty-two states, including only Tennessee of the eleven former Confederate states.⁶²

"SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions, and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

⁶¹ Our research in the state materials has necessarily been limited to those available in the Library of Congress, including its Microfilm Collection of Early State Records prepared under the supervision of Professor W. S. Jenkins, of the University of North Carolina. Detailed accounts of the ratification proceedings in all of the states appear in the Appendix to this brief.

⁶² In three of these states—Ohio, New Jersey and Oregon—resolutions were passed by the state legislature in 1868 to withdraw the prior consent to the Amendment. In each in-

It was rejected by three border states and the other Southern states. In 1868, as a condition of restoration under the Reconstruction Act, seven Southern states ratified the Amendment, along with Iowa, and it came into effect. Subsequently, in compliance with the Reconstruction Act, the other three Southern states ratified.

Ratification by the Northern states in 1866 and 1867 was on the basis of party lines, with the Republican legislatures approving the Republican plan of reconstruction for the South. Rejection by the Southern and the border states was based on opposition to that plan of reconstruction. In both cases the emphasis was upon the political clauses.⁶³

The Fourteenth Amendment as "a plan for reconstruction for the South" was a highly controversial party issue in the elections of 1866. Interest centered on its political clauses: the redistribution of representation under section 2 and the related question of Negro suffrage; the disqualification of Southern leaders under section 3; and the war debt provisions of section 4. References to the first section during the election campaigns were, as a rule, brief and general in nature, such as, for instance, that this section made the Civil Rights Act of 1866 a part of the Constitution, that

stance the attempted "rescission" came after a change in the party control of the legislature. See Flack, *The Adoption of the Fourteenth Amendment* (1909), pp. 165-168, 170.

⁶³A more detailed review is in Flack, *supra*, chs. III, IV.

it meant Negro equality, or that it centralized power in Congress."⁴⁴

With emphasis during the campaign of 1866 on the political clauses and with little need after the election to do more than carry out the decision of the voters, there was little occasion to analyze the Amendment in detail, and still less occasion to discuss the specific applications of the first section. The Governors' messages to the state legislatures were in general terms, as were the committee reports recommending ratification.⁴⁵

⁴⁴ See Flack, *supra*, pp. 140-160.

⁴⁵ Governor Morton of Indiana, for example, said little more than that

"No public measure was ever more fully discussed before the people, better understood by them, or received a more distinct and intelligent approval. I will enter into no arguments in its behalf before this General Assembly. Every member understands it. * * *" (Indiana Senate Journal 1867, p. 42.)

Governor Crawford of Kansas submitted the Amendment with this comment:

"Whilst the foregoing proposed amendment is not fully what I might desire, nor yet, what I believe the times and exigencies demand, yet, in the last canvass, from Maine to California, it was virtually the platform which was submitted to the people; the verdict was unmistakable. The people have spoken on the subject, at the ballot-box, in language which cannot be misunderstood." (Kansas Senate Journal 1867, p. 45.)

Governor Fenton of New York, in recommending adoption of "a proposition so moderate and so just" stated that

"I need not discuss the features of this amendment; they have undergone the ordeal of public consideration since the adjournment of Congress in July last, and they are understood, appreciated and approved. * * *

There were sufficient references to the first section to show an understanding that it guaranteed to the Negroes full rights as citizens, but the exact content of those rights was not spelled out. It was to provide "civil equality before the law,"⁶⁶ "equal protection of all citizens in the enjoyment of life, liberty and property,"⁶⁷ "all the political and civil rights citizenship confers,"⁶⁸ and "to destroy all legal caste within our borders."⁶⁹

The first section was intended

to destroy every distinction founded upon a difference in the caste, nationality, race or color * * * which has found its way into the laws of the Federal and State Governments which regulate the civil relations or rights of the people. * * * In all matters of civil legislation and administration there shall be perfect legal equality in the advantages and securities guaranteed by each State to everyone here declared a citizen.⁷⁰

In the debates in Pennsylvania, where school segregation existed, Senator Landon expressed this idea more forcefully:

"There is no other plan before the people, and the verdict of the ballot-box implies that no other plan is desired. * * * " (New York Assembly Journal 1867, vol. 1, pp. 13-14.)

⁶⁶ Governor Bullock, Massachusetts Acts and Resolves 1867, p. 820.

⁶⁷ Governor Brownlow, Tennessee Senate Journal, Called Session, 1866, p. 4.

⁶⁸ Governor Oglesby, Illinois Senate Journal, 1867, p. 40.

⁶⁹ Taylor in the Pennsylvania debates. Pennsylvania Legislative Record, 1867, App., p. XXII.

⁷⁰ Jenks, opposing ratification, in the Pennsylvania debates, *id.* p. XLI.

* * * You ask me: what do you want for the colored man? I reply, do you let the white rebel go to school? I claim that the colored man shall go to school; do you protect the white man before the law, you shall protect the colored man before the same law; do you punish a crime in a colored man, you shall punish the same in a white man in the same way; and a virtue that will reward a white man shall be rewarded in the colored man. Do you let the white rebels of Carolina or Florida vote, then in the name of Heaven command that the colored man in the same State shall vote.⁷¹

Opposition to the amendment, in so far as it referred to the first section, was based on its transfer of power to the Federal Government.⁷²

In the South, where the Amendment was at first rejected, emphasis was given to the political clauses, particularly those dealing with representation and with disqualification of the former

⁷¹ *Id.*, p. IX.

⁷² Thus, the minority report of the Wisconsin Senate Committee on Federal Relations commented that

"The first section, in connection with the fifth, will give to the federal government the supervision of all the social and domestic relations of the citizens in the state and to subordinate state governments to federal power." (Wisconsin Senate Journal 1867, p. 98.)

The minority report in New Hampshire characterized the Amendment as

"* * * a dangerous infringement upon the rights and independence of all the States, North as well as South, assuming, as it does, to control their legislation in matters purely local in their character." (New Hampshire House Journal 1866, pp. 176-177.)

leaders of the South.⁷³ The validity of the procedure by which the Amendment was submitted was also attacked, the argument being that a Congress from which representatives of the Southern states were excluded could not properly propose an amendment.⁷⁴

The first section was attacked, not so much on the ground that it extended rights to the Negroes, but that it, together with the fifth section, enlarged the powers of the Federal Government to such an extent as to destroy the rights of the states.⁷⁵

⁷³ See Flack, *supra*, p. 159.

⁷⁴ See, for example, the report of the Georgia Joint Committee on the State of the Republic, Georgia Senate Journal, 1866, pp. 65-71.

⁷⁵ For example, Governor Patton of Alabama, in recommending rejection of the Amendment, stated as an objection to the first section that:

"It would enlarge the judicial powers of the General Government to such gigantic dimensions as would not only overshadow and weaken the authority and influence of the State courts, but might possibly reduce them to a complete nullity. It would give to the United States courts complete and unlimited jurisdiction over every conceivable case, however important, or however trivial, which could arise under the State laws. Every individual dissatisfied with the decision of a State court, might apply to a Federal tribunal for redress." (Alabama Senate Journal 1866, p. 33.)

Governor Walker of Florida, referring to the first and fifth sections, stated that:

"These two Sections taken together, give Congress the power to legislate in all cases touching the citizenship, life, liberty or property of every individual in the Union, of whatever race or color, and leave no further use for the State governments. It is in fact a measure of consolidation entirely

The later messages of the Southern Governors recommending ratification of the Amendment because such ratification was a condition precedent to readmission into Congress contained no analysis of the Amendment. The ratification of the Amendment by the Southern states was perfunctory, without any discussion of its meaning or effect.⁷⁶

In our review of the records of the ratification proceedings, the specific references to the possible effect of the Amendment on education consist of three brief statements: that of Senator Landon of Pennsylvania, quoted *supra*, p. 62; a statement by Representative Ross in the Indiana debates that under the Amendment "The blacks would sit with us in the jury-box, and with our children in the common schools";⁷⁷ and a report changing the form of government." (Florida Senate Journal 1866, p. 8.)

⁷⁶ A typical example was Governor Murphy's message to the Arkansas legislature in which he remarked that:

"As the reconstruction laws require the ratification of this 14th Article before the State will be received and recognized as a State in the Union, it will be unnecessary for me to say more to the present Legislature, composed of loyal citizens of the State, than merely call their attention to the importance of early attention to the ratification of the same." (Arkansas House Journal 1868, p. 19.)

The record of House action is equally typical.

"On motion of Mr. SIMS, the rules were suspended by a two-thirds vote, and the joint resolution was placed on its second reading; after which it was engrossed, and read a third time and put upon its final passage by calling of ayes and nays." (*Id.*, p. 22.)

⁷⁷ Brevier Legislative Reports, 1867, p. 80.

from a Kentucky contributor to a newspaper that the Democrats in Kentucky say "That amendment admits * * * their children to the public schools. * * *"⁷⁸

The paucity of the available materials on the ratification of the Fourteenth Amendment by the states is such as to preclude any definite conclusion as to the existence of any general understanding of the effect which the Amendment would have on racial segregation in public schools. Apart from the few scattered references given above, we have found no manifestations of an awareness in the state legislatures that the Amendment would affect public education, as this Court later held in *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, and related cases (see pp. 143-149, *infra*), by imposing on a state the duty of furnishing such education to all its citizens, if furnished to some, on a basis of equality of right. The available materials do show that there were widespread expressions of a general understanding of the broad scope of the Amendment similar to that abundantly demonstrated in the Congressional debates (pp. 20-56, *supra*), namely, that the first section of the Amendment would establish the full constitutional right of all persons to equality before the law and would prohibit legal distinctions based on race or color.

⁷⁸ McPherson's *Scrap Book, Fourteenth Amendment*, p. 84 (name of paper not given).

F. CONTEMPORANEOUS ACTIONS, FEDERAL AND STATE,
BEARING ON SCHOOL SEGREGATION

The Reconstruction period, during which the Fourteenth Amendment was adopted, also witnessed other actions, both in Congress and the states, which are relevant to an inquiry into the contemporaneous understanding of the Amendment's effect on school segregation. The 39th Congress in 1866 also passed laws concerning (a) the schools maintained by the Freedmen's Bureau, and (b) the public schools in the District of Columbia. In the proceedings in Congress in 1868 and 1870 on the readmission of the Southern states there were some references to the matter of public school education for Negroes. In later Congresses, repeated efforts were made, particularly under the leadership of Senator Sumner, to provide specific enforcement of the rights secured by the Fourteenth Amendment. These efforts culminated in the Civil Rights Act of 1875. At one stage in its legislative history that Act contained a provision forbidding racial segregation in public schools. In the states, various actions were taken to provide public education for Negroes. In some states, particularly in the North, existing laws for segregated schools were continued; in other states, particularly in the South, school segregation laws were enacted shortly after the Fourteenth Amendment was adopted; in still other states, provisions for mixed schools were enacted. In this section of the brief

we shall summarize these actions, both federal and state, and attempt to evaluate them as evidence of a contemporary understanding as to the Fourteenth Amendment's effect on racial segregation in public schools.

1. Federal legislation in the 39th Congress

(a) *The Freedmen's Bureau Extension Act.*

In May 1866 there was again raised in the House the question of extending the life of the Freedmen's Bureau and providing it with the authority to safeguard the welfare and civil rights of the freedmen. (Congressional Globe, 39th Cong., 1st Sess., p. 2743.) Representative Eliot reported from his Select Committee on Freedmen a bill (H. R. 613) similar to the one vetoed by President Johnson in February 1866 (*supra*, pp. 23-25), and it passed the House without any particularly significant discussion. (Globe, p. 2878). In the Senate, it was referred to the Military Affairs Committee, of which Senator Wilson was chairman, and was favorably reported with substantial amendments. (Globe, p. 3409). It passed the Senate in June, but was vetoed by the President. (Globe, pp. 3413, 3838.) With no discussion, the veto was overridden in both House and Senate, and the bill became law July 16, 1866. (Globe, pp. 3842, 3850; 14 Stat. 173.)

The House version of the bill had made provision for the maintenance of schools for the freedmen, with equipment and teachers to be supplied

by private societies."⁷⁹ The Senate kept that provision, and added a provision for financing the schools from the property of the Confederate States. (Globe, pp. 3409, 3410.) After the termination of the Freedmen's Bureau, the remaining proceeds of such property were to be distributed proportionately to those southern states "which have made provision for the education of their citizens without distinction of color." There was also resolved a long-standing dispute as to the disposition of certain islands off Georgia and South Carolina, which General Sherman had devoted to the freedmen's use. (Globe, p. 2809.) One provision in resolution of that dispute distributed the proceeds of a certain portion of those lands to "the support of schools, without distinction of color or race, on the islands in the parishes of St. Helena and St. Luke." (Globe, p. 3409.)

These two provisions are the only instances in which the 39th Congress legislated directly to establish schools that were financed in whole or in part from Federal funds, and it is noteworthy that in these provisions it expressed a policy

⁷⁹ The educational societies concerned were the successors of the former abolitionist groups and adhered to their concepts of equality in civil rights. Thus, the American Freedmen's Union Aid Commission, a central organization of these societies, had in its constitution a provision that "no schools or supply depots shall be maintained from the benefits of which any person shall be excluded because of color." *American Freedman* (1866), p. 18.

favoring schools making no distinctions on grounds of race or color.

(b) *School Legislation for the District of Columbia.* A month after the 39th Congress submitted the Fourteenth Amendment to the states, it provided that an earlier school act for the District of Columbia (the Act of June 25, 1864, 13 Stat. 187) should be construed to require the authorities of Washington and Georgetown to pay over certain moneys for the support of the separate colored schools in those cities (Act of July 23, 1866, 14 Stat. 216). A week later, on the final day of the session, Congress passed a bill authorizing a grant of three lots in Washington for colored schools (Act of July 28, 1866, 14 Stat. 343).

Separate schools for colored children had been established for Washington County by the Act of May 20, 1862, 12 Stat. 394, and for the cities of Washington and Georgetown by the Act of May 21, 1862, 12 Stat. 407. When Congress in the Act of June 25, 1864, *supra*, provided a reallocation of taxes for the support of the various District school systems, it left unchanged the existing provisions for separate colored schools. It is to be noted that none of the foregoing measures received much attention in Congress. There were no written committee reports. All were considered perfunctorily as part of routine District business, and were passed with scarcely any debate or division in vote. (Globe, 37th Cong., 2d Sess. pp.

1544, 2037, 2157; *Globe*, 38th Cong., 1st Sess., pp. 2814, 3126.)⁸⁰

It is contended that the 1866 school legislation for the District of Columbia evidences an understanding by the 39th Congress, which proposed the Fourteenth Amendment, that the Amendment did not prohibit racially-segregated schools. We believe that no persuasive inference can be drawn of any connection between these acts and the Amendment. In the first place, separate schools in the District for colored children had been established by Congress four years before the Fourteenth Amendment was proposed. The 1866 Acts were only implementations of the existing legislation. The legislative history of those measures contains no indications that they were regarded as having any relation to the Fourteenth Amendment. The latter was the product of the Joint Committee on Reconstruction; the District schools bills were reported by the Senate and House District Committees, none of whose members was on the Joint Committee. (*Globe*, 39th Cong., 1st Sess., pp. 11, 21, 57, 106.) The Amendment was passed by Congress only after prolonged and searching debate, while the school measures were considered perfunctorily, amid a welter of routine District business. There were no committee

⁸⁰ Cf. *Metropolitan Rd. v. District of Columbia*, 132 U. S. 1, 5, on the limited extent of interest and interference by Congress in the internal affairs of the District prior to the Organic Act of 1871, 16 Stat. 419.

reports, no debate or noteworthy comment. There was no roll call vote in either House or Senate on these bills. (Globe, 39th Cong., 1st Sess., pp. 2719, 3906, 4278.)

The Act of July 23, 1866, dealt with a question raised in a local controversy regarding the allocation of school funds. It merely provided that there would be made available for the Negro schools, newly-created under the legislation of 1862, the funds which the Congress had previously committed for their support, but which had been locally withheld. Similarly, in the Act of July 28, 1866, the question was merely one of easing the financial burden of supporting the Negro schools by the donation of building sites. In the debates on these bills, characterized by their sponsor, Senator Morrill of Maine,⁸¹ as "very small measures * * * which will take no great time anyway" (Globe, 39th Cong., 1st Sess., p. 2716), there is no evidence that any member of Congress thought that its action on these measures would constitute a legislative interpretation of the Fourteenth Amendment, or indeed that the Amendment was in any way relevant. Congress was exercising its exclusive jurisdiction over the District, to which the Fourteenth Amendment in terms did not apply. Moreover, the conditions prevailing in the District during this period

⁸¹ Senator Morrill, in the debates during this same session on the Civil Rights Act, expressed the conviction that the Constitution forbade distinctions based on race or color. (Globe, 39th Cong., 1st Sess., pp. 570-571.)

were such as to make the question of mixed or separate schools relatively unimportant. Throughout the entire period the overriding problem was to make a beginning in providing some schools for Negroes. Prior to the war, the problem of Negro education had been completely disregarded by the Congress; and at each step taken after 1860, attention was focussed on the need of creating educational facilities for a race that theretofore had received no public educational benefits. Details of school organization were subordinated to that need, and were not considered and discussed in Congress.

2. Legislation in Congress after 1866

(a) *Readmission of the Southern States.* Under the Reconstruction Act of March 2, 1867 (14 Stat. 428) the Southern states, as a condition of representation in Congress, were required to form "a constitution of government in conformity with the Constitution of the United States in all respects" which was to be submitted to Congress "for examination and approval." In 1868, the new constitutions were submitted to Congress by Alabama, Arkansas, Florida, Georgia, Louisiana, North Carolina, and South Carolina, and those states were readmitted (15 Stat. 72, 73). None of these state constitutions provided for separate schools for colored children; in at least three of them (Louisiana, South Carolina, and Florida) a provision for mixed schools was expressed or implied. (See *infra*, pp. 97-98.)

In the House debates, opponents of the reconstruction program unsuccessfully objected to provisions in the constitutions of Alabama (Congressional Globe, 40th Cong., 2d Sess., pp. 1937, 2197), Arkansas (Globe, p. 2395), Louisiana (Globe, p. 2449), and South Carolina (Globe, p. 2447), which they thought required mixed schools.

In the Senate debates on the readmission of Arkansas, Senator Drake of Missouri proposed the following condition:

That there shall never be in said State any denial or abridgment of the elective franchise, or of any other right, to any person by reason or on account of race or color, excepting Indians not taxed. (Globe, p. 2748.)

Senator Henderson of Missouri offered as a substitute:

* * * the further condition that no person on account of race or color shall be excluded from the benefits of education, or be deprived of an equal share of the moneys or other funds created or used by public authority to promote education in said State.

In the ensuing colloquy it appeared that Senator Henderson feared that the term "or of any other right" in Senator Drake's proposal might be construed as requiring mixed schools. Accordingly, his substitute was intended explicitly to permit separate schools. (Globe, p. 2748.)

In answer to a question from Senator Henderson, Senator Frelinghuysen of New Jersey (not a member of Congress when the Fourteenth Amendment was proposed) stated his view that neither the Drake proposal nor the Amendment "touches that question, as to what school they shall be educated in * * *." (Globe, p. 2748.) Senator Henderson explained that:

I desire that the negroes shall have an equal right in the school moneys, but that the State may require them to be educated in different schools from the whites. * * * But I would not provide here by a condition that the States should extend the same rights to the negroes in regard to office-holding, marrying, or anything else, that they do to the whites * * *

His amendment was defeated, however, by a vote of 30 to 5 (*ibid*). The Drake amendment was agreed to,⁸² but subsequently the Senate accepted the House version of the bill not containing that amendment.

In 1870 Virginia (16 Stat. 62), Mississippi (16 Stat. 67) and Texas (16 Stat. 80) were read-

⁸² The omnibus bill for the admission of other Southern states, reported from the Judiciary Committee the next day (Globe, p. 2759), contained the Drake amendment with the words "or any other right" omitted. Senator Trumbull explained that their insertion "might be construed by some persons as applying possibly to social rights, or rights in schools, which the Senator from Missouri did not intend; and as the committee thought there was no importance in the words they are left out of the amendment." (Globe, p. 2858.)

mitted. Each act of admission contained a condition:

That the constitution * * * shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State.

The bill for the admission of Virginia as reported by the Committee on Reconstruction (H. R. 783, 41st Cong., 2d Sess., *Globe*, p. 362) contained an express prohibition on amending the state constitution:

* * * to prevent any person on account of race, color, or previous condition of servitude from * * * participating equally in the school fund or school privileges provided for in said constitution * * *

Its inclusion was explained as required by the bitter hostility to the common-school system expressed by the newly elected Governor of Virginia. (*Globe*, pp. 402, 442, 546.) It was justified as essential to a republican form of government. (*Globe*, pp. 485, 500.) Similarly, the provision concerning school rights in the bill for the admission of Mississippi was justified as a means of preserving a republican form of government. (*Globe*, pp. 1253, 1255.) The view was also expressed that under the Fourteenth Amendment the colored man was entitled to "the same rights and privileges of schools that the white man has * * *." (*Globe*, p. 1329.) The debates are concerned, however, with the guarantee of education to

the Negroes rather than with the question of separate schools.

Georgia was "reconstructed" a second time (16 Stat. 59, December 22, 1869) and readmitted in July 1870 (16 Stat. 363). The bill for admission of Georgia (H. R. 1335, 41st Cong., 2d Sess.; Globe, p. 1702) contained a condition on school rights similar to that in the Virginia, Mississippi, and Texas acts, but the final act contained no conditions. The debates indicate the same view that opportunity of education for the Negroes was an element of a republican form of government (Globe, p. 1704).

In sum, therefore, the debates on the readmission of the Southern states into the Union fail to disclose any definite understanding as to the effect of the Fourteenth Amendment on school segregation, but it is of some significance that none of the state constitutions submitted to and approved by Congress as being "in conformity with the Constitution of the United States in all respects" provided for segregated schools (see *infra*, pp. 97-98).

(b) *Legislative Attempts to Abolish School Segregation in the District of Columbia.* In 1871 the issue of public schools of the District of Columbia came squarely before the 41st Congress. On January 23, 1871, a bill was introduced in the Senate, S. 1244, to regulate the organization and conduct of the public schools in the District of Columbia. (Globe, 41st Cong., 3d Sess., p. 663.) The bill was reported by the District Committee

with an amendment which would abolish racial segregation in the District schools. (Globe, p. 1054.⁸³) The amendment was vigorously supported on the floor of the Senate by Senator Sumner, a member of the District Committee, and several other Senators on the ground that it was required by the principle of equality underlying the Fourteenth Amendment. (Globe, pp. 1055, 1056, 1058.) Sumner stated that "Every child, white or black, has a right to be placed under precisely the same influences, with the same teachers, in the same school room, without any discrimination founded on his color". (Globe, p. 1055.) Senator Carpenter of Wisconsin agreed:

Mr. President, we have said by our Constitution, we have said by our statutes, we have said by our party platforms, we have said through the political press, we have said from every stump in the land, that from this time henceforth forever, where the American flag floats, there shall be no distinction of race or color or on account of previous condition of servitude, but that all men, without regard to these distinctions, shall be equal, undistinguished before the law. Now, Mr. President, that principle covers this whole case. (Globe, p. 1056.)

None of the opponents of the bill explicitly controverted the view that the Amendment's broad

⁸³ This and succeeding references to the Congressional Globe are, until otherwise noted, to the 41st Cong., 3d Sess.

principle applied to racial segregation in the schools. (See *Globe*, pp. 1054, 1056, 1057, 1059, 1060.) The bill, however, was dropped without any vote, in favor of more pressing business, and was not taken up again. (*Globe*, p. 1061.)

Another bill was introduced by Senator Sumner in the next Congress on December 12, 1871. (S. 365, *Globe*, 42d Cong., 2d Sess., p. 68.) This bill, "to secure equal rights in the public schools of Washington and Georgetown," would also have abolished racial segregation in those schools. Like its predecessor, it was put aside, after a brief debate containing nothing of significance here, without any vote, in favor of other business. (*Globe*, 42d Cong., 2d Sess., pp. 2539, 2542, 3057, 3058, 3099-3100, 3122-3125.)

(c) *Civil Rights Act of 1875*. The issue of racial segregation in public schools came before the Congress for extended but indecisive consideration between 1870 and 1875 in connection with the efforts of Senator Sumner and others for further civil rights legislation.

Sumner, advocate of the 1871 proposals to abolish racial segregation in the District public schools, had in 1870 introduced a bill to secure the right of all citizens throughout the United States to "full and equal enjoyment" in respect of theaters, conveyances, inns, and public schools. (S. 916, 41st Cong., 2d Sess., *Globe*, p. 3434.) In substantially its original form, it was reintroduced

in each subsequent Congress until 1873, but without success. In 1872, it was twice attached to amnesty bills in the Senate. (H. R. 380, H. R. 1050, 42d Cong., 2d Sess., *Globe*, pp. 919, 3268.) Both of these amnesty bills (with the civil rights rider) failed because they did not receive in the Senate the two-thirds vote required under section 3 of the Fourteenth Amendment, although they did receive majority approval. Similarly, efforts during the same session to suspend the House rules to bring up the House counterpart of Sumner's bill failed of the two-thirds vote necessary, despite clear majorities. (*Globe*, 42d Cong., 2d Sess., pp. 1956, 3383, 3932, 4321-4322.) The debates in Congress on these bills proceeded on the understanding that they would require non-segregated schools throughout the country, and this was one of the most controversial points in issue. (*Globe*, 42d Cong., 1st Sess., App., p. 216; *Globe*, 42d Cong., 2d Sess., pp. 241-243, 384; 2 Cong. Rec. 4088.)

In 1873, in the first session of the 43d Congress, Sumner again introduced a bill prohibiting segregation generally, including segregation in the schools. Civil and criminal penalties were provided for violation. (S. 1; 2 Cong. Rec. 10.) In March 1874, a month after Sumner's death, the bill was reported favorably by the Senate Judiciary Committee. (2 Cong. Rec. 3053.) An attempt on the floor to amend the bill by adding a provision permitting "separate but equal" schools

failed (2 Cong. Rec. 4167), and in May the bill passed the Senate (2 Cong. Rec. 4176). However, several efforts to bring the bill up for consideration in the House failed because of dilatory tactics on the part of the minority. (2 Cong. Rec. 4242, 4439, 4691, 5162.)

In 1874, in the second session of the 43d Congress, the House Judiciary Committee reported a civil rights bill similar to Sumner's, but containing a provision expressly permitting "separate but equal" schools. (H. R. 796; 3 Cong. Rec. 116.) Consideration on the floor was again impeded by the tactics of the minority, which forced one continuous three-day session. (3 Cong. Rec. 786-829.) A compromise was finally reached (see *infra*, pp. 82-84), and the bill passed the House on February 4, 1875, after deletion not only of the provision for segregated schools, but also of any reference whatever to schools. (3 Cong. Rec. 1010, 1011.) Senate approval of the bill, in the compromise form, followed shortly thereafter. (3 Cong. Rec. 1870.) The bill, which has come to be known as the Civil Rights Act of 1875, became law on March 1, 1875, 18 Stat. 335.⁴⁴

The members of Congress who throughout this period persisted in their advocacy of unsegregated schools included many who had been prominent

⁴⁴ This Act was declared unconstitutional in 1883 in the *Civil Rights Cases*, 109 U. S. 3, the Court holding that the Fourteenth Amendment's prohibitions extended only to state and not to individual actions.

in the passage of the Fourteenth Amendment in 1866.⁸⁵ Sumner was their leader until his death. His view, frequently expressed, was that the Reconstruction Amendments had established the sweeping principle that

all persons without distinction of color shall be equal before the law. Show me, therefore, a legal institution, anything created or regulated by law, and I show you what must be opened equally to all without distinction of color. Notoriously, the hotel is a legal institution, originally established by the common law, subject to minute provisions and regulations; notoriously, public conveyances are in the nature of common carriers subject to a law of their own; notoriously, schools are public institutions created and maintained by law; and now I simply insist that in the enjoyment of those institutions there shall be no exclusion on account of color. (Cong. Globe, 42d Cong.,

2d Sess., p. 242; see also, *supra*, p. 77.)

To Sumner, public schools⁸⁶ established by law could not be maintained on a segregated basis:

⁸⁵ For example, in 1874 when the Senate passed Sumner's bill (S. 1) prohibiting racial segregation in the public schools, by a vote of 29 to 16, the majority included nine former members of the 39th Congress—Allison, Boutwell, Conkling, Edmunds, Howe, Morrill of Vermont, Stewart, Washburn and Windom. No Senator who had participated in the framing of the Fourteenth Amendment voted with the minority. 2 Cong. Rec. 4176.

⁸⁶ Sumner agreed to provisions permitting segregation in private schools, as proposed by Frelinghuysen. (Globe, 42nd Cong., 2d Sess., 435, 487, 3267.)

The separate school wants the first requisite of the common school, inasmuch as it is not equally open to all; and since this is inconsistent with the declared rule of republican institutions, such a school is not republican in character. Therefore it is not a preparation for the duties of life. The child is not trained in the way he should go; for he is trained under the ban of inequality. How can he grow up to the stature of equal citizenship? He is pinched and dwarfed while the stigma of color is stamped upon him. (Globe, p. 384.)

Senators Conkling, Boutwell and Justin Morrill, all members of the Joint Committee on Reconstruction in 1866, apparently shared Sumner's views. (See, e. g., 2 Cong. Rec. 4151, the vote rejecting the "separate but equal" amendment.) Others of the majority likewise rejected the contention that separate school facilities were permissible under the Fourteenth Amendment. To Morton of Indiana, the Senate majority leader, segregation was a violation of the principle of equality embodied in the Fourteenth Amendment, which had taken "from the States the power to make class legislation." (Cong. Globe, 42d Cong., 2d Sess., p. 847.) Senator Pease of Mississippi agreed that there could be no real equality in "equal advantages in separate schools." (2 Cong. Rec. 4154.) See also footnote 40, *infra*, p. 103.

The opposition in the Senate was led by Senator Thurman of Ohio, of the minority party, who argued that equal protection of the laws, with

regard to public schools, required only that school funds should be applied so that "each citizen shall have an equal advantage from its application." (Globe, 42d Cong., 2d Sess., App. p, 26; see 2 Cong. Rec. 4083-4089.) Other members of the minority expressed the view that the requirement of equality was satisfied if the separate facilities were equivalent. (See, e. g., Globe, 42d Cong., 2d Sess., p. 241.)

As discussed *supra*, p. 79, the Sumner bill was not reached in the House, which took up instead a similar bill that contained a provision permitting schools to be "separate but equal". (H. R. 796, *supra*.) The school issue proved a stumbling block, and a compromise was reached on the bill, striking all reference to schools, only a short time before its passage. Congressman Cain of South Carolina, a Negro, indicated that for the sake of unity within the majority party, the Negroes would accede to the elimination of all reference to schools. (3 Cong. Rec. 957, 981-982.) As Congressman Monroe of Ohio stated, the Negroes thought that "their chances for good schools will be better under the Constitution with the protection of the courts than under a bill containing such provisions as this [the "separate but equal" provision]." (3 Cong. Rec. 998.) Moreover, the fear was expressed that if the provision requiring mixed schools was insisted upon "then in certain States of the South schools will be abandoned altogether." (3 Cong. Rec. 981.)

The controversy in the House and the reasons for the compromise effected were fully summarized by Congressman Butler of Massachusetts, Chairman of the Judiciary Committee, who himself had also been a member of the 39th Congress :

There are two kinds of opinion in the republican party on this question. I myself would legislate equal privileges to white and black in the schools, if I had the power, first, to legislate, and secondly, to enforce the legislation. But the difficulty I find in that is, that there is such a degree of prejudice in the South that I am afraid that the public-school system, which has never yet obtained any special hold in the South, will be broken up if we put that provision into the bill. Then comes the provision of the committee that there shall be separate schools wherever schools are supported by taxation. There are some difficulties with an unwilling people in carrying out that provision, and there is an objection to it on the part of the colored people, because they say they desire no legislation which shall establish any class distinction.

Then comes the proposition * * * to strike out all relating to schools. I should very much rather have all relating to schools struck out than have even the committee's provision for mixed schools. (3 Cong. Rec. 1005-1006.)

It would appear, therefore, that the compromise form of the bill as enacted represented mutual concessions by the opposing groups, not as to the

substantive issue of the power of Congress to prohibit school segregation, but solely in recognition of the impossibility of securing from the Congress at that time any decision between the conflicting views on this question.

The Congressional actions subsequent to 1866, which have been summarized above, have relevance as early interpretations of the scope of the Fourteenth Amendment. However, as evidence of contemporaneous understanding, their value is doubtful. Although only a few years had elapsed since the adoption of the Amendment, there had occurred a substantial change not only in the membership of the Congress, but in the intensity of the movement, which had reached its high point in 1866 with the proposal of the Fourteenth Amendment, for securing through national action full protection of the Negro's right to equal treatment.

Throughout this period there were consistent legislative attempts to implement the principles of equality embodied in the Fourteenth Amendment. One such attempt, remarkable for its persistence, was the attempt to end segregation in the public schools. While it ended in failure, the consideration and the support it received in Congress indicate that a substantial group in the Congress, at times a majority, regarded it as necessary and appropriate in carrying out the broad principles established in the Fourteenth Amendment. The failure of this effort resulted in part from the use

of dilatory parliamentary tactics by the opposition. Another contributory factor was the belief of a substantial number of Congressmen that legislation to prohibit school segregation would destroy the public school system in the South, then in its infancy, and would thus completely deprive Negroes in that section of the benefit of public education.

The failure to include a provision in the Civil Rights Act of 1875 specifically forbidding public school segregation does not appear to represent a legislative judgment that the Fourteenth Amendment permitted such segregation, or that it could not be judicially construed, in the light of future conditions, to require invalidation of state segregation laws. As has been shown, some members of Congress may have accepted the compromise form of the bill because it would preserve the question of equal educational treatment of Negroes for later judicial determination. No conclusive inferences can be drawn, therefore, from the legislative history of the 1875 Act to show an understanding either that the Amendment precluded or permitted state laws providing for segregation in public schools.

3. State legislation and decisions

At the time when the Fourteenth Amendment was before the states for ratification and during the period immediately after ratification, there was widespread interest and concern in the extension of public education. Prominent in the

discussions was the question of education for the Negroes not merely in the South, where four million freedmen had to be educated to meet their new responsibilities as citizens, but also in the North, where the events of the preceding years had called attention to the status of the Negroes in those states as well.

The movement for general public education, which had begun in the 1830's, took on new impetus in both the North and South after the Civil War. Nearly every Governor's message in the postwar period dealt with the problem of public education in the state, making suggestions for improvement and justifying larger expenditures in the interest of general enlightenment. In the South the Reconstruction constitutional conventions were all concerned with public education. Each of the Constitutions specified that it was the duty of the legislature to make provision for education of all the children of the state, and the first legislatures elected under them passed comprehensive common school laws.

Although the governors, both in the Northern and Southern states, in urging education for the Negroes made their recommendations contemporaneously with submission of the Fourteenth Amendment for ratification, and frequently in the same message, there was no reference to the Amendment as relevant to the question. Education of the Negroes was said to be required

by state constitutional provisions, by natural justice, and by the desirability of educating the citizens of a republic. The question was dealt with not in the framework of federal constitutional requirements, but as a matter of determining state policy.

Congress also regarded education as important for the protection of the Negroes in their new status. As has been noted *supra*, pp. 74-75, in the acts restoring Mississippi (16 Stat. 67), Texas (16 Stat. 80) and Virginia (16 Stat. 62) to representation, Congress specified that the state constitutions should never be amended to deprive any citizen of "the school rights and privileges secured by" those constitutions. Similar provisions were considered and rejected in consideration of the readmission of Arkansas (Congressional Globe, 40th Cong., 2d Sess., p. 2748) and Georgia (Congressional Globe, 41st Cong., 2d Sess., p. 4796). These debates are inconclusive, however, on the relevance of the Fourteenth Amendment to this question, with greater attention being given to education as an element in a republican form of government.

Furthermore, there was no apparent awareness in the states that the Fourteenth Amendment required that education for colored children be furnished on a basis of equality. Thus, the laws

of California,⁸⁷ Indiana,⁸⁸ and Ohio⁸⁹ at the time did not provide schools for colored children in areas where they were insufficient in number to warrant a separate school. Those of Delaware and Maryland allotted to Negro education only taxes raised among the colored population.⁹⁰ In New York in 1869 the Supreme Court in *Dallas v. Fosdick*⁹¹ sustained the validity of segregated schools in Buffalo, saying that

The right to be educated in the common schools of the state, is one derived entirely from the legislation of the state; and as such, it has at all times been subject to such restrictions and qualifications as the legislature have from time to time deemed it proper to impose upon its enjoyment.

As is more fully discussed *infra*, pp. 104-110, this failure to appreciate the applicability of the Fourteenth Amendment to the subject of public education appears to have been widely shared at the time, and conceivably may explain the ratification of the Amendment by legislatures in states where school segregation then existed or was established shortly thereafter.

⁸⁷ Cal. Laws 1866, c. 342, sec. 57.

⁸⁸ Ind. Laws 1869 (Special Session), p. 41, sec. 3.

⁸⁹ 51 Ohio Laws, p. 429, sec. 31 (1853), as amended, 61 Ohio Laws 31, sec. 4 (1864).

⁹⁰ Del. Laws 1875, c. 48; Md. Laws 1868, c. 407, c. ix.

⁹¹ How. Prac. Rep. 249, 251 (Sup. Ct. 1869).

a. *Negro education in the North.* At the time of the adoption of the Fourteenth Amendment, Negroes had been given some share in the public school systems established in the great majority of the Northern and border states.⁹² The form and extent of their participation varied greatly, from complete absence of segregation in the New England states to strict segregation in others. Some states made segregation mandatory; others left it to the discretion of the local school boards either by specific authority in the state legislation or under the general powers of the local boards; others prohibited the exclusion of colored children from public schools of their choice.⁹³ Historically, the usual sequence was the establishment of a public school system for white children, followed either by the admission of colored children or by the creation of separate schools for Negroes.

⁹² There were five states outside of the South (Indiana, Illinois, Kentucky, Maryland, and Delaware, the last three being slavery states), which in their laws, either directly or by implication, excluded colored children entirely from the public schools.

⁹³ The laws of eight states provided generally for separate schools for colored children: California, Kansas, Missouri, Nevada, New York, Ohio, Pennsylvania, and West Virginia. Thirteen states had either no segregation law or expressly prohibited segregation: Connecticut, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, Oregon, Rhode Island, Vermont, and Wisconsin. The state laws are discussed in detail in the Appendix to this brief. A brief survey is contained in Barnard, *Special Report of the Commissioner of Education*, 41st Cong., 2d Sess., H. Ex. Doc. No. 315 (1871), p. 323 *et seq.*

Although in the North the emphasis was on improved public education for all, the emancipation of the Negroes focussed interest on their education. Governor Morton of Indiana, for example, in his message to the legislature in 1865,⁹⁴ urged that, as a matter of "natural justice" as well as "sound political economy" and as an example to the Southern states, the Negroes should be given educational opportunities in the public school system. He said:

An ignorant and degraded element is a burden and injury to society, whatever may be its color. It therefore becomes a matter of sound political economy, as well as absolute justice, that whatever colored population we may have should be educated, and enabled to become intelligent, industrious and useful members of the community.⁹⁵

Along with the question whether education for the Negroes should be provided, was the question of how they were to be educated, whether in mixed schools or in separate schools. This, too, was discussed without reference to the Fourteenth Amend-

⁹⁴ Brevier Legislative Reports 1865, pp. 31-32.

⁹⁵ Similarly, in 1869 the Superintendent of Public Instruction in Illinois pleaded with the legislature to extend public education to the 7,000 colored children who were excluded from "all the blessings of public education." (Ill. Doc. 1869, vol. 2, p. 557.) Compare the report of the School Superintendent of Indiana to the state legislature in 1867, in which he concluded that "the welfare of the government, i. e., the State requires the education of all the community, hence of the colored man. * * *" (Ind. Doc. 44th Reg. Sess. (1867), Part I, p. 338.)

ment, at least prior to 1872, when the decision of the Supreme Court of Ohio in *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, directed public attention to the issue. (See *infra*, pp. 102-103). In 1870, Governor Bowie, in recommending modification of the Maryland school law to provide education for colored freedmen, made no reference to the Fourteenth Amendment:

* * * If at a period, immediate or remote, they are to become citizens, possessed of the elective franchise, would not sound policy, then, dictate such education of the colored population as would prepare them intelligently to exercise the elective franchise, and as citizens to judge for themselves of the proper workings of our political system, and not be misled by the crafts and clamors of designing and unscrupulous politicians? Education among the colored people of the State would have a beneficial effect in rendering them more valuable in any position they may be destined to fill. It would doubtless render them, as a class, more virtuous and provident, and better members of the community in which they live.*

In the decade immediately following the ratification of the Fourteenth Amendment the established basic patterns of non-segregation or segregation in the Northern states continued with only slight changes. The changes in the school laws were, as a rule, directed not toward abolition

* Md. Docs. 1870, H. Doc. A, pp. 14-15.

of segregation but rather toward strengthening and equalizing the school rights of the colored children. Some states, such as Michigan (in 1867),⁹⁷ and Connecticut (in 1868),⁹⁸ declared by statute the right of all children to attend any public school in the district where they resided; others enacted penalties for school boards refusing admission of colored children into the common schools (*e. g.*, Kansas, 1867).⁹⁹

Among the states which had, prior to the ratification of the Amendment, excluded Negroes from the public schools, Indiana admitted them on a segregated basis in 1869,¹ with an amendment enacted in 1877² which gave them access to "white" schools where no separate schools were provided or where the colored school did not offer the higher grades available at "white" schools. Illinois, while not expressly providing for segregation in its school law of 1872,³ considered segregation an administrative matter in the discretion of the county and local school authorities,⁴ but insisted that colored children be admitted to some school.⁵ In Chicago, as early as 1867 more satis-

⁹⁷ Mich. Laws 1867, Act No. 34.

⁹⁸ Conn. P. L. 1868, p. 206. Similar laws were already in force in Minnesota (1864) and Rhode Island (1866).

⁹⁹ Kans. Laws 1867, ch. 125.

¹ Ind. Laws 1869 (Spec. Sess.), p. 41.

² Ind. Laws 1877, p. 124.

³ Ill. P. L. 1872, p. 700.

⁴ Report of Superintendent of Public Instruction, 1869-70. Ill. Doc. 1871, part 1, pp. 355-356.

⁵ Ill. P. L. 1874, p. 120.

factory experience with mixed schools than with segregated schools was reported.*

Kentucky did not provide for a "common school system for the colored children" until 1874,⁷ making it unlawful for children of any race to attend a school assigned to the other. Maryland in 1872, and Delaware in 1875, provided for separate public schools for Negroes.⁸

The contemporary discussions on segregated schools that are available do not show that the lawmakers and school administrators were aware of the relevance of the Fourteenth Amendment to the subject. The closest reference found is the remark of the Superintendent of Public Instruction of Indiana in 1868 that "whatever distinctions may have been previously made in the rights and privileges of citizens by our laws, they have been set aside by the emendations of our National Constitution and the 'Civil Rights Bill.'"⁹ The context makes it clear that he was referring to the total exclusion of Negroes from the public school system; he pleaded for Negro education, but being aware of the "deeply-seated prejudice in the minds of many citizens," he suggested separate schools,¹⁰ follow-

* Report of Superintendent of Public Instruction of Indiana, 1867-68, pp. 26-27, Ind. Doc. 1867-68, part 1.

⁷ Ky. Laws 1873-74, ch. 521.

⁸ Md. Laws 1872, c. 377, c. xviii (cf. Md. Laws 1868, c. 407, c. ix); Del. Laws 1875, ch. 48.

⁹ Report of Superintendent of Public Instruction, 1867-68, p. 23. Ind. Doc. 1867-68.

¹⁰ *Ibid.*; and see Report, 1865-66, Ind. Doc. 1867, Part 1, p. 339.

ing the lead which Governor Morton had taken as early as 1865.¹¹ The debates on the Indiana school law of 1869 dealt with the question whether the inferior treatment of Negroes in schools satisfied the state constitutional requirements of equality, but no reference was made to the Fourteenth Amendment.¹²

In Illinois, the Superintendent of Public Instruction insisted in strong terms on the Negroes' right to an "equal education" as required by the state constitution of 1870 and implemented by the school law of 1872.¹³ In his view,¹⁴ the equality required by the state constitution was satisfied by either separate or mixed schools.¹⁵

The rulings of the Commissioner of Common Schools in Ohio, in 1869 and 1870, emphasized that colored youths have "precisely the same right to school funds" that white youths have; where their number is too small for a separate school, the school board has discretion either to admit them to the white school or to "have them taught in

¹¹ Brevier Legislative Reports (1865), pp. 31-32.

¹² 10 Brevier Legislative Reports (1869), pp. 193 *et seq.*, 340 *et seq.*, 490 *et seq.*; 11 *id.* (1869 Extra Session), pp. 114 *et seq.*, 387 *et seq.*

¹³ Report of Superintendent of Public Instruction, 1871-72, Ill. Doc. 1873, vol. 2, p. 231 *et seq.*

¹⁴ *Id.*, 1869-70, Ill. Doc. 1871, p. 355, *et seq.*

¹⁵ Subsequently, the Superintendent adopted the view sustained in *State ex rel. Garnes v. McCann*. 21 Ohio St. 198 (1872), that the Fourteenth Amendment permitted separate schools. *Id.*, 1873-74, p. 416.

some other way"; "but they must be taught till their funds are exhausted."¹⁶

In the Constitutional Convention in Ohio in 1873 and 1874 there was a brief discussion of school segregation.¹⁷ A delegate unsuccessfully proposed a constitutional amendment providing for separate schools for the two races, "so as to give each the equal benefit of a common school education," but with local option for mixed schools.¹⁸ He argued that education was a matter exclusively for the states and urged his amendment "in order to have the Constitution of Ohio stand up for its own citizens against Federal usurpation * * *" in the form of the Fourteenth Amendment.¹⁹

In a debate on segregation in 1867 in the Pennsylvania legislature, in connection with a law providing for homes for soldiers' orphans,²⁰ the sponsor of a proposal for nonsegregated homes emphasized the inequalities which resulted from segregation in the common school system. No mention was made of the Fourteenth Amendment.

b. *Negro Education in the South.* In the Southern states there had been no public education for Negroes, and in most states any education for Negroes was prohibited. In the immediate postwar period, schools were established by the Freedmen's Bureau and benevolent associations,

¹⁶ 18th Annual Report, Ohio Doc. 1869, p. 885, *et seq.*

¹⁷ Ohio Constitutional Convention, 1873-74, Debates, vol. 2, part 2, p. 2238, *et seq.*

¹⁸ *Id.*, pp. 2238-2839.

¹⁹ *Id.*, pp. 2240-2241.

²⁰ Pa. Legislative Record 1867, Appendix, p. CCCXLII.

but even for white children the public school systems had been disrupted by the war. (See pp. 8-9, *supra*.)

In the postwar period, education of the Negroes was regarded by the white leaders as a necessity arising out of emancipation, the changed status of the Negroes, and their obtaining the suffrage in the new state constitutions. Governor Smith of Alabama in 1868, for example, urged a common school system with provision for education for the colored people on the ground that

With enlarged freedom and full opportunities for individual development should come the most ample facilities for obtaining that information that makes a man the peer of his fellows, and enables him to protect his own interests, at the same time that he is better fitted to discharge his duties as a citizen.²¹

Similar recommendations were made by the Governors of Arkansas,²² Georgia,²³ Louisiana,²⁴ and North Carolina.²⁵

During the years in which the Fourteenth Amendment was before the states for ratification, the question of separate or mixed schools was extremely controversial in the Southern states. In

²¹Alabama Senate Journal 1868, p. 14.

²²Arkansas House Journal 1868, p. 296.

²³Georgia House Journal 1870, p. 416.

²⁴Louisiana Legislative Documents 1870, Message of the Governor, p. 7.

²⁵North Carolina Public Documents 1867-68, Doc. No. 2, Sess. 1868, pp. 5-6.

most of the Reconstruction constitutional conventions, proposals were made to require or to prohibit separate schools.²⁶ In seven the constitution as adopted contained no specific provision on this point. In Louisiana²⁷ and South Carolina²⁸ the constitution required mixed schools, and in Florida²⁹ the requirement was implied. None required separate schools.³⁰

The constitutions were submitted to Congress for approval in accordance with the requirement of the Reconstruction Act that they be "in conformity with the Constitution of the United States in all respects."³¹ (See pp. 72-76, *supra*.) In addition to the provisions on education, these constitutions contained general provisions guar-

²⁶ Alabama Convention Journal, pp. 153, 237-8; Arkansas Convention Debates and Proceedings, p. 645, *et seq.*; Georgia Convention Journal, p. 151; Louisiana Convention Journal, pp. 60-61, 94, 200-2, 268-70, 277; Mississippi Convention Journal, pp. 316, 318, 479-80; South Carolina Convention Proceedings, pp. 71, 88, 100, 685-709, 889-894, 899-901; Texas Convention Journal, I, pp. 896, 898, 912; Virginia Convention Journal, pp. 67, 299, 308, 333, 335, 336, 339, 340.

²⁷ Louisiana Constitution of 1868, Arts. 135, 136.

²⁸ South Carolina Constitution of 1868, Art. X, sec. 10.

²⁹ Florida Constitution of 1868, Art. IX, sec. 1.

³⁰ The debates in Arkansas and South Carolina contain arguments on the policy of having mixed or separate schools, but do not show any specific reference to the applicability or inapplicability of the Fourteenth Amendment to the question, even though the members of the conventions were aware of the impact of the Amendment on other issues. The debates in the other conventions were not reported, except for the early stages of the Virginia convention.

³¹ 14 Stat. 428, sec. 5.

anteeing "equal civil and political rights and public privileges,"³² or "the same" rights and privileges,³³ or prohibiting "distinctions" on account of race or color.³⁴ There were instances of a prohibition on discrimination in places of business or public resort,³⁵ and a prohibition on distinctions in public institutions.³⁶ In no instance did the constitution submitted to Congress and approved by it state that inequality or segregation was permitted.

The available records in these states do not, however, show an awareness that the Fourteenth Amendment might be relevant in determining the basis on which public education was furnished. The recommendations made concerning education to the same Reconstruction legislatures which ratified the Amendment contained no reference to it. Segregation was not stated to be permitted by the Amendment, nor was equality in education for Negroes stated to be required by the Amendment.

Except for Arkansas and Florida, none of the ten Southern states had a statutory provision for a segregated public school system at the time it ratified the Fourteenth Amendment.³⁷ In five

³² Alabama Constitution of 1867, Art. I, sec. 2.

³³ Louisiana Constitution of 1868, Art. 2.

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³⁴ South Carolina Constitution of 1868, Art. X, sec. 4.

³⁵ Louisiana Constitution of 1868, Art. 13.

³⁶ Mississippi Constitution, 1868, Art. I, sec. 21.

³⁷ An Arkansas statute in 1867 required Negroes to attend separate schools. (Arkansas Laws 1866-67, No. 35, Sec. 5, p. 100.) The new state constitution adopted in

of these ten states, school segregation was established by laws enacted within a year after ratification of the Fourteenth Amendment.³⁸ In Louisiana, the city of New Orleans succeeded in maintaining separate schools despite the state constitutional prohibition.³⁹ Again, however, no specific references have been found to show that the advocates of separate schools in these states were aware of the relevance of the Fourteenth Amendment to the question.

c. State judicial decisions on Negro education. During the period from 1868 to 1882, the school rights of colored children were litigated in state courts in a number of cases. These cases may be divided into three distinct groups, so far as the relevance of the Fourteenth Amendment is concerned.

April 1868, shortly before the legislature ratified the Amendment, provided generally that free schools for "all persons" should be maintained. Some members of the constitutional convention regarded this as requiring mixed schools. (Arkansas Convention Debates and Proceedings, pp. 660, 666, 672.) In Florida, separate schools for Negroes were established under an 1866 statute. (Florida Laws 1865, No. 12, ch. 1475.) The new state constitution adopted in 1868, before the Amendment was ratified, provided for "the education of all the children residing within its borders, without distinction or preference". (Constitution of 1868, Art. IX, sec. 1.)

³⁸ Alabama Laws 1868, p. 148 (Act of the Board of Education); Arkansas Laws 1868, No. 52, Sec. 107, p. 163; Georgia Laws 1870, No. 53, Sec. 32; North Carolina Laws 1868-69, ch. 184, Sec. 50, p. 471; Virginia Laws 1869-70, ch. 259, Sec. 47.

³⁹ Louisiana House Debates 1869, pp. 209-10, 217-20, 246-7.

Some cases were argued and decided solely on the basis of state constitutional and statutory provisions. Thus, the Supreme Court of Iowa held in 1868 that the equality of school rights as guaranteed in the state constitution ("education of all the youths of the State") and as implemented by the school law denied school authorities any discretion to classify school children according to race or color. *Clark v. The Board of Directors, etc.*, 24 Iowa 267. Accord: *Smith v. The Directors, etc.*, 40 Iowa 518, and *Dove v. The Independent School District*, 41 Iowa 689, both decided in 1875. Similarly, in Illinois the state supreme court held in 1874 that school directors had no power under the state constitution and school law to make racial distinctions so as to deprive colored children of the benefits which white children received in the public schools. *Chase v. Stephenson*, 71 Ill. 383. A New York court in 1869 sustained the validity of a provision in a city charter requiring separate schools, on the ground that under state law there was no "right" to education. No reference was made to the Fourteenth Amendment. *Dallas v. Fosdick*, 40 How. Pr. Rep. 249 (Sup. Ct. 1869). (See pp. 88-89, *supra*.)

In other cases, although the Fourteenth Amendment was mentioned or considered, the decision was placed upon the narrower ground of state constitutional or statutory law. Thus, a Pennsylvania court in 1873 upheld the right of colored

children to be admitted to the white school in a district where no colored school was established. *Commonwealth ex rel. Brown v. Williamson*, 10 Phila. 490. In that case the judge applied what he regarded as the clear mandate of the school law, remarking that he failed to see that any right arising out of the Fourteenth Amendment was involved. The Supreme Court of Illinois, in *People ex rel. John Longress v. The Board of Education, etc.*, 101 Ill. 308 (1882), held that the state constitution and school law did not permit a school board to assign colored pupils to a school outside the district of their residence. It did not therefore reach the question of the applicability of the Amendment. The Supreme Court of Kansas, in deciding that a school board had no power under state law to establish segregated schools, left open the question whether state legislation authorizing segregated schools would violate the Fourteenth Amendment, pointing out that this question could be finally determined only by the Supreme Court of the United States. *Board of Education v. Tinnon*, 26 Kans. 1 (1881). See also *State ex rel. Stoutmeyer v. Duffy*, 7 Nev. 342 (1872), which held that the equality of rights guaranteed by the state constitution was violated by the exclusion of Negroes from the public schools, but that the state statute, while "probably" opposed to the spirit of the Fourteenth Amendment, did not violate its letter.

Finally, there is a group of cases in which the Fourteenth Amendment was the main issue and the principal ground of decision. The earliest of these is *State ex rel. Garnes v. McCann*, 21 Ohio St. 198 (Dec. Term 1871). The Supreme Court of Ohio held that the Amendment had no bearing on such exclusively domestic matters as school legislation, and that if it did, the classification of pupils according to color was not contrary to the Amendment, since all children were provided equal facilities. The *McCann* case became a leading precedent on the question of the validity of school segregation.⁴⁰ It was followed in New York (*People v. Easton*, 13 Abbott's Pr. R. (N. S.) 159, Sup. Ct., 1872) and Indiana (*Cory v. Carter*, 48 Ind. 327, 1874), although in the latter case the facilities for educating colored children were plainly unequal. In California, the Supreme Court reached the same conclusion in *Ward v. Flood*, 48 Cal. 36 (1874), relying exclusively upon *Roberts v. City*

⁴⁰ In the debates on the bill which became the Civil Rights Act of 1875, the minority Senators who unsuccessfully opposed a provision prohibiting school segregation expressly relied upon the *McCann* case, as well as *Roberts v. City of Boston*, 5 Cush. (Mass.) 198, decided in 1850. See Congressional Globe, 42nd Cong., 2nd Sess., pp. 3257, 3261. Senator Frelinghuysen, in charge of the bill, distinguished both the *McCann* case and *Clark v. Board of Directors*, 24 Iowa 267, on the ground that they were based on state constitutional and statutory provisions and therefore "afford no precedent for the construction of this bill when enacted. The language of this bill secures full and equal privileges in the schools, subject to laws which do not discriminate as to color." 2 Cong. Rec. 3452. And see pp. 80-82, *supra*.

of *Boston*, 5 Cush. (Mass.) 198, decided eighteen years before the Amendment was adopted. On the other hand, a lower court in Pennsylvania held that classification of school children according to race or color violated the Fourteenth Amendment. *Commonwealth v. Davis*, 10 Weekly Notes 156 (1881).

These various groups of cases, taken in their entirety, thus fail to evidence any general and definite contemporaneous judicial construction of the Amendment as applied to school segregation.

d. *Significance of the contemporaneous state laws providing for school segregation.* The fact that a number of states had segregated school systems when the Fourteenth Amendment was adopted, or established them shortly thereafter, does not necessarily reflect a contemporaneous understanding that the Amendment permitted "separate but equal" schools for colored children. It is argued that this must have been the general understanding at the time, for otherwise these states could not consistently have ratified the Amendment.

The difficulty with this argument, however, is that the historical facts on which it is based do not support the conclusions which are drawn from them. The inquiry here must be, what was the state of mind—so far as their understanding of the scope and application of the Fourteenth Amendment is concerned—of those responsible for the simultaneous ratification of the Amend-

ment and enactment or continuation of school segregation legislation? As has been shown (*supra*, pp. 57-65), virtually no evidence is to be found in the available records of the ratification proceedings indicating that the question of school segregation was considered in connection with the debates on the Amendment itself. Moreover, as has also been shown (*supra*, pp. 86-100), there is little evidence that the state legislators and other officials responsible for the school laws considered the relevance of the Fourteenth Amendment and deliberately concluded that these laws were not in conflict with the Amendment.

This absence of evidence showing an awareness that the Fourteenth Amendment might have some relation to school segregation is consistent with at least five different views which might conceivably have been held on this subject at that time: (1) that the Amendment had no application whatsoever to public education furnished by a state; (2) that the Amendment did apply to public education, but only to the extent that if a state provided education for white children, it also had to provide some education (not necessarily equal) for colored children; (3) that the Amendment permitted a state to have separate schools for colored children, provided the facilities afforded them were substantially equal to the schools for white children; (4) that the Amendment was essentially a grant of power to Congress, and unless or until Congress should

prohibit it from doing so, a state could make such provision for the education of its children as it deemed proper; or (5) that, while the Amendment required that colored children be treated equally with respect to public education, that requirement was then satisfied, in view of the special circumstances existing in the period following emancipation of the slaves, by establishing separate schools for colored children.

It is submitted that, of these various possible conclusions which might be drawn, the one least supported by the available historical materials is that which finds in them a contemporaneous understanding that the Amendment permitted the states to establish separate schools for white and colored children, so long as the facilities furnished were substantially equal. We believe that, while each of these various possible understandings can summon some support, none can be demonstrated to be valid to the exclusion of the others. This question is one as to which historians can rely only on conjecture and speculation rather than on demonstrable fact. In the circumstances, such inferences as may be drawn from the available data are too tenuous and inconclusive to furnish a reliable basis for present-day judicial interpretation of the Amendment.

Because public education was regarded as a privilege conferred by the state, rather than as a right due the citizen, and was supported wholly by state taxation, it may well have been considered

that public schools were wholly within the domestic jurisdiction and discretionary control of each state and therefore unaffected by the Fourteenth Amendment. This possibility is given weight by early decisions of the state courts, e. g., *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 207-208 (Dec. Term, 1871); *Ward v. Flood*, 48 Cal. 36 (1874); *Cory v. Carter*, 48 Ind. 327, 360 (1874); cf. *Cumming v. Board of Education*, 175 U. S. 528, 545 (1899), and is perhaps the conclusion which most logically explains the silence of the available contemporary historical materials on the question of the relation of the Fourteenth Amendment to school segregation. As a valid interpretation of the Amendment, however, it has now been emphatically rejected by this Court's repeated holdings that although it is a "privilege," public education, if granted to some citizens, must be extended to all on a basis of equality of right. *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337; *Sipuel v. Board of Regents*, 332 U. S. 631; *Sweatt v. Painter*, 339 U. S. 629.

One paramount difficulty with the "separate but equal" hypothesis as to the original understanding of the Amendment is its failure to account for the fact that colored children were educated in schools which were not equal even in a physical sense. Patent inequalities were often sanctioned by requiring that schools be established for white children while colored schools were merely authorized or permitted, or

were provided only when a given number of colored children lived in the school district. Even where the laws did not discriminate, colored schools were still largely inferior when compared with white schools on a physical or pedagogical basis. This fact is more consistent with an understanding that the Amendment was satisfied if some provision, however unequal, was made for colored children than with a "separate but equal" understanding. But the former conception of the Amendment, if it existed, has been unequivocally rejected by this Court. *Missouri ex rel. Gaines v. Canada*, *supra*; *Sipuel v. Board of Regents*, *supra*; *Sweatt v. Painter*, *supra*.

In 1868 public schools had been hardly begun in many states and were still in their infancy. School attendance was, as a general matter, not compulsory. The Negroes had just been released from bondage and were generally illiterate, poor, and retarded socially and culturally. To educate them in the same classes and schools as white children may have been regarded as entirely impracticable. It is possible that state legislatures—while recognizing in the Fourteenth Amendment a clear mandate of equality—may have considered separate schools for colored children as a temporary practical expedient permitted by the Amendment. Many proponents of Negro education regarded separate schools as a more effective means of extending the benefits of the public school system to the colored people; for, since school attendance was generally

not compulsory, fear of discrimination might well have deterred Negro children from attending existing "white" schools in many areas.⁴¹

It is not necessary to assume that these state legislatures considered their segregated schools as completely free from possible attack under the Amendment, nor does it necessarily follow that they were deliberately flouting its prohibitions. It was widely thought that the Amendment was primarily intended to remove constitutional doubts from the Civil Rights Act of 1866 and to give Congress the power to redress inequalities and discriminations imposed on the Negroes in the states. This is echoed in this Court's opinion in *Ex Parte Virginia*, 100 U. S. 339, 345, which hinted that the federal judiciary might have no power to enforce the Amendment except where expressly authorized by Congress, and also in Senator Sumner's attempts until his death to persuade Congress to use its power under Section 5 to prohibit separate schools. (*Supra*, pp. 76-86.) It is not unlikely that state legislators may have felt themselves free to exercise their judgment as to the desirability of school

⁴¹ " * * * Previously, such [colored] children were received into any public school at which they presented themselves; but the prevailing prejudice against them was so great that many preferred rather to remain away from school altogether than to face it. The provision for separate schools was practically a boon to the colored people, although it probably grew out of an indisposition to permit their children to attend school with white children." J. P. Wickersham, *A History of Education in Pennsylvania* (1886), p. 506.

segregation until Congress should act. It may also have been thought, although not articulated, that the constitutional issue would ultimately be resolved by this Court, and that the states were not bound to observe any constitutional prohibitions against school segregation unless and until this Court should declare them.

All of these hypotheses are possible. None can be demonstrated to be true. We do not contend for the validity of any one above the others. We conclude only that the historical facts, as distinguished from assumptions, are too equivocal and inconclusive to furnish a solid basis upon which this Court can determine the application of the Amendment to the question of school segregation as it exists today, when school attendance is compulsory and when there are no considerations of an educational character which warrant separation of children of different races in public schools.

In striking down various forms of state legislation as unconstitutional racial discriminations, this Court has not been deterred by the existence of such legislation on the statute books during the period when the Fourteenth Amendment was ratified. Thus, in 1879, the Court held that state laws which excluded Negroes from juries denied them the equal protection of the laws. *Strauder v. West Virginia*, 100 U. S. 303. Such statutes were to be found in a number of states. *E. g.*, West Virginia (Acts of 1872-1873, p. 102, reenacting chapter 116 of the 1870 Code), Kentucky (Gen. St. 1873 (Bullock & Johnson), ch. 62, Art. III, § 2),

Missouri (Wagner's Mo. Stat. 1870 (2d ed.), ch. 80, § 2), and Oregon (Gen. Laws of Oregon, 1843-1872, Civil Code, § 918). The Court in the *Strauder* case observed (p. 306) that at the time the Fourteenth Amendment was incorporated into the Constitution "it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. *It was well known that in some States laws making such discriminations then existed, and others might well be expected.*" [Italics added.]

In the racial restrictive covenant cases (*Shelley v. Kraemer*, 334 U. S. 1; *Hurd v. Hodge*, 334 U. S. 24), there was a background of unbroken judicial enforcement of such covenants in nineteen states and the District of Columbia extending over a period of 33 years (No. 72, 1947 Term, Brief for the United States, pp. 40-45). In overturning the rule applied by these decisions, no reference was made either to their number, their uniformity, or their age. And when the Court held in *Nixon v. Herndon*, 273 U. S. 536, decided in 1927, that a state statute excluding Negroes from participation in primary elections was a "direct and obvious infringement" of the Fourteenth Amendment, the

prevailing view of the state courts, going back as far as 1887 (*Commonwealth v. Helm*, 9 Ky. L. Rep. 532), was that a primary election is "purely a legislative creation" as to which "the legislature was subjected to no constitutional inhibition" (*State ex rel. Hatfield v. Carrington*, 194 Iowa 785, 786).⁴² Mr. Justice Holmes, speaking for the Court in *Nixon v. Herndon*, disposed of the matter in a few words (p. 541): "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."

G. SUMMARY AND CONCLUSIONS

(1)

The Congressional history of the Fourteenth Amendment shows that the Amendment was proposed and debated as part of a broad and continuing program to establish full freedom and legal equality for Negroes. Many in the Congress which considered the Thirteenth Amendment understood it to abolish not only slavery but also its concomitant legal discriminations. This understanding rested on a belief that that Amendment had made the Negro an indistinguishable part of the population and hence entitled to the same rights and privileges under the laws as all others. The enactment of the Black Codes in

⁴² The cases are collected in Mangum, *The Legal Status of the Negro* (1940) pp. 407-409.

the Southern states made it obvious, however, that additional protection by the national government was required.

The civil rights legislation enacted by the 39th Congress was designed to strike down distinctions based on race or color. From the debates on that legislation, however, there emerged the view that the Thirteenth Amendment alone did not afford a sufficient constitutional basis for such action, and that a further amendment was necessary. In the same debates there was also crystallized the view that only explicit constitutional embodiment of the principle of equality before the law could protect that principle from change by some future Congress.

The attempt in the 39th Congress, through the Bingham "equal rights" amendment, to provide a direct constitutional basis for national legislation guaranteeing equal treatment under the law failed because of the belief that it left the matter open to future congressional change and destroyed the balance between federal and state power. The Fourteenth Amendment was proposed to remedy these deficiencies. Section 1 of that Amendment, to both its proponents and opponents, was an express constitutional recognition of the doctrine of "absolute and perfect" equality under the law—the same doctrine which had underlain the Thirteenth Amendment, the civil rights legislation, and Bingham's unsuccessful "equal rights" amendment.

Neither the majority nor the minority in the 39th Congress evidenced any substantial disagreement as to the broad scope of Section 1 of the Amendment. The majority repeatedly affirmed that it would firmly secure the principle that the "law which operates on one man shall operate equally upon all" and would prohibit all legislation by the states drawn on the basis of race and color. The opposition similarly understood its broad purpose; it was on that basis that they voiced their objections.

While the debates reflect a clear understanding as to the breadth of the principle of equality under law embodied in the Fourteenth Amendment, neither its proponents nor its opponents found it necessary or appropriate to catalog exhaustively the specific application of its general principle. Only a few such examples were given during the debates on the Amendment itself. It is noteworthy that one of the majority spokesmen, at a time when the majority was proceeding under the discipline of party caucus, illustrated the racial discriminations which the Amendment would reach by reference to a state law discriminating against Negroes in public schools. He did not, however, make specific mention of the system of racial segregation which the state law required.

In the debates on the civil rights legislation, which are an integral part of the immediate background of the Fourteenth Amendment, the minority expressed the view that existing state systems of racially-segregated public schools would be

stricken down by the broad principle of equal treatment under the law. This view was not disputed by the majority. A like objection was voiced to Bingham's "equal rights" amendment which sought to embody the same general principle. Again, the majority did not take issue with this understanding of its scope. It is also worthy of note that not only were Bingham's proposal and Section 1 of the Fourteenth Amendment alike in their general purpose; they were also similar in language.

In sum, while the legislative history does not conclusively establish that the Congress which proposed the Fourteenth Amendment specifically understood that it would abolish racial segregation in the public schools, there is ample evidence that it did understand that the Amendment established the broad constitutional principle of full and complete equality of all persons under the law, and that it forbade all legal distinctions based on race or color. Concerned as they were with securing to the Negro freedmen these fundamental rights of liberty and equality, the members of Congress did not pause to enumerate in detail all the specific applications of the basic principle which the Amendment incorporated into the Constitution. There is some evidence that this broad principle was understood to apply to racial discriminations in education, and that it might have the additional effect of invalidating state laws providing for racial segregation in the public schools.

There is a paucity of available evidence as to the understanding of the state legislatures which ratified the Amendment, in part because of the almost complete absence of records of debates, in part perhaps because their function was to accept or reject a proposal rather than to draft one.

In the states most attention was given to the political aspects of the Republican "plan of reconstruction," which received popular approval in the elections of 1866. It was frequently stated that the Amendment guaranteed to the Negroes full rights of equality as citizens, but the scope and content of those rights were not detailed. The opponents of the Amendment objected to the first section on the ground that it, together with the fifth section, expanded the powers of the Federal Government at the expense of the rights of the states. There were almost no references to schools during consideration of the amendment.

At the time of consideration and ratification of the Fourteenth Amendment, some of the Northern states had and continued segregated schools and some of the Southern states, in providing for the first time for public education for Negroes, established separate schools. In the historical context in which these actions were taken, however, they do not evidence an understanding as to the reach of the Fourteenth Amendment. The inferences to be drawn from these actions necessarily rest on conjecture and speculation. The scanty evidence available suggests that the

legislatures were probably unaware that the Amendment was relevant to education, even to the extent of requiring equal, though separate, schools. Proponents of education for Negroes based their arguments on grounds other than the Fourteenth Amendment, and made no reference to it.

In sum, the available materials are too sparse, and the specific references to education too few, to justify any definite conclusion that the state legislatures which ratified the Fourteenth Amendment understood either that it permitted or that it prohibited separate schools.

(3)

There is no direct evidence at the time of the adoption of the Amendment that its framers understood specifically that future Congresses might, in the exercise of their power under section 5, abolish segregation in the public schools. They clearly understood, however, that Congress would have the power to enforce the broad guarantees of the Amendment, and the Amendment was deliberately framed so as to assure that the rights protected by section 1 could not be withdrawn or restricted by future Congresses.

Subsequently, in the debates on the Civil Rights Act of 1875, some of the framers expressed an understanding that segregated schools were contrary to the Amendment and that Congress could and should abolish them. While an express prohibition against segregated schools was not con-

tained in the Act in its final form, its omission did not spring from doubt of the power of Congress to enact such a prohibition; other types of segregation were barred by the Act. Since section 5 of the Fourteenth Amendment authorizes Congress only to enforce the provisions of the Amendment, the apparently prevalent understanding in Congress that it could prohibit school segregation is evidence of a tacit assumption that segregation in schools was in conflict with the broad principles declared in section 1.

No specific references have been found in the debates on the Fourteenth Amendment to show any expressed contemporary understanding of its framers as to the judicial power, in light of future conditions, to construe the Amendment as abolishing school segregation of its own force. Some evidence of such an understanding is, however, found in the debates on the Civil Rights Act of 1875.

(4)

In the *Slaughter-House Cases*, 16 Wall. 36, decided on April 14, 1873, less than five years after the Fourteenth Amendment was adopted, this Court was called upon for the first time to construe that Amendment. Six years later, in *Strauder v. West Virginia*, 100 U. S. 303, the Court first considered the application of the Amendment to a state law involving a racial discrimination. In each instance the opinion of the Court dwelt at length upon the history and purposes of the

Reconstruction Amendments. The studies which have been made in preparing this brief have only served to confirm the accuracy of the contemporary historical observations made in the *Slaughter-House* and *Strauder* opinions by the members of this Court who themselves had lived during the period when the Amendment was adopted. The great events of the Reconstruction period were still fresh in their minds, and required for them no elaborate investigation into recondite historical materials.

Mr. Justice Miller's opinion for the Court in the *Slaughter-House Cases* noted at the outset (pp. 67-68): "The most cursory glance at these articles [the Thirteenth, Fourteenth, and Fifteenth Amendments] discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. * * * Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt." After referring to the abolition of slavery by the Thirteenth Amendment, the Court pointed out (pp. 70-71):

The process of restoring to their proper relations with the Federal government and with the other States those which had sided with the rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the

formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

* * * * *

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.

The Court concluded its review of the history of the Amendments as follows (pp. 71-72) :

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all ; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested ; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made free-man and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

We do not say that no one else but the negro can share in this protection. * * * But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accom-

plished, as far as constitutional law can accomplish it.

In *Strauder v. West Virginia*, 100 U. S. 303, Mr. Justice Strong's opinion for the Court contains a similar exposition of the history and objectives of the Fourteenth Amendment (pp. 306-308) :

This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases* (16 Wall. 36), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was

abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. * * *

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. * * * It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?

The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

* * * The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Decided the same day as the *Strauder* case were *Virginia v. Rives*, 100 U. S. 313, and *Ex parte Virginia*, 100 U. S. 339, which also involved questions under the Fourteenth Amendment as to exclusion of Negroes from juries. In *Virginia v. Rives*, the Court, referring to the civil rights statutes (now 8 U. S. C. 41 and 42) enacted by Congress pursuant to the Fourteenth Amendment, said (p. 318): "The plain object of these statutes, as of the Constitution which authorized them, was

to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same."

Similarly, in *Ex parte Virginia*, the Court stated (pp. 344-345): "One great purpose of these [Thirteenth and Fourteenth] amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color."

Elsewhere in this brief (see pp. 139-141, *infra*) we have quoted at length from the opinions of this Court, extending over a period of more than three-quarters of a century, which show a consistent recognition that the Fourteenth Amendment is to be construed liberally so as to carry out the great and pervading purpose of its framers to establish complete equality for Negroes in the enjoyment of fundamental human rights and to secure those rights against enforcement of legal distinctions based on race or color.

(5)

As has been shown, no conclusive evidence of a specific understanding as to the effect of the Fourteenth Amendment on school segregation has been found in its legislative history. But this Court has neither declared nor applied any canon

of constitutional interpretation that a construction of an amendment which is warranted by its provisions and manifest policy cannot be adopted unless it is also affirmatively supported by specific evidence in the legislative history showing that its framers so "intended." See *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59, 63-64; *Breedlove v. Suttles*, 302 U. S. 277. To be sure, the Court will review "the background and environment" of the period in order to illuminate the broad purposes which an amendment was designed to achieve. *E. g.*, *Everson v. Board of Education*, 330 U. S. 1, 8; *McPherson v. Blacker*, 146 U. S. 1, 27. In attempting to determine the application of the amendment to a specific issue, however, the Court will give scant regard to inconclusive excerpts from debates which are relied upon to show a "legislative intent." The Court's attitude on this subject was summarized in *Maxwell v. Dow*, 176 U. S. 581, 601-602, involving a claim that the Fourteenth Amendment was intended to make applicable to the states the jury requirements of the Sixth Amendment:

Counsel for plaintiff in error has cited from the speech of one of the Senators of the United States, made in the Senate when the proposed Fourteenth Amendment was under consideration by that body, * * * and counsel has argued that this court should, therefore, give that construction to the amendment which was contended for by the Senator in his speech.

* * * It is clear that what is said in Congress upon such an occasion may or may not express the views of the majority of those who favor the adoption of the measure which may be before that body, and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually therein used and not by the speeches made regarding it.

What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, * * * does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which members voted in adopting it. * * *

In the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three-fourths of the States before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted.

And see *United States v. Wong Kim Ark*, 169 U. S. 649, 699.⁴³

The Court has emphasized in many cases that the process of interpreting and applying the provisions of the Constitution, which as Chief Justice Marshall said was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs,"⁴⁴ is not comparable to construing a contract or statute, where the judicial task is essentially to ascertain and give effect to the intended meaning of the words used. Constitutional provisions like "due process of law" and "equal protection of the laws" express broad principles of government the essence of which is their vitality and adaptability to the progressive changes and needs of the nation. The Court, speaking through Chief Justice Hughes, has said:⁴⁵

If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the

⁴³ Mr. Justice Frankfurter, concurring in *Adamson v. California*, 332 U. S. 46, stated (p. 64) that "Remarks of a particular proponent of the [Fourteenth] Amendment, no matter how influential, are not to be deemed part of the Amendment. What was submitted for ratification was his proposal, not his speech." And see the concurring opinion of Mr. Justice Bradley in the *Legal Tender Cases*, 12 Wall. 457, 560.

⁴⁴ *McCulloch v. Maryland*, 4 Wheat. 316, 415.

⁴⁵ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 442-443.

framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a *constitution* we are expounding" (*McCulloch v. Maryland*, 4 Wheat. 316, 407) * * *.

The opinions of the Court, particularly those which have come to be recognized as landmarks in the development of American constitutional law, are replete with expressions of a similar nature. They are familiar to the Court, and it is not necessary to repeat them here *in extenso*. A few examples will suffice to show how clearly and consistently the Court has articulated this rule of constitutional interpretation:

Weems v. United States, 217 U. S. 349, 373-374 (McKenna, J.):

* * * Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which

no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. * * *

Gompers v. United States, 233 U. S. 604, 610 (Holmes, J.):

* * * But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. * * *

United States v. Classic, 313 U. S. 299, 316 (Stone, J.):

* * * in setting up an enduring framework of government they [the framers] undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of

the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.

Wolf v. Colorado, 338 U. S. 25, 27 (Frankfurter, J.):

* * * basic rights do not become petrified as of any one time, even though as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.⁴⁶

⁴⁶ See also *Davidson v. New Orleans*, 96 U. S. 97, 104; *Hurtado v. California*, 110 U. S. 516, 530-531; *Holden v. Hardy*, 169 U. S. 366, 385, 386-387; *South Carolina v. United States*, 199 U. S. 437, 448; *Helvering v. Davis*, 301 U. S. 619, 640-641; *Rochin v. California*, 342 U. S. 165, 169-172; and cf. *Browder v. United States*, 312 U. S. 335, 339-340. For non-judicial writings of the members of this Court, see Holmes, *The Common Law* (1881), pp. 35-36; *The Path of the Law*, 10 Harv. L. Rev. 457, 469, 472 (1897); Brandeis, *The Living Law*, 10 Ill. L. Rev. 461 (1916); Hughes, *Addresses* (1916), pp. 354-355; *The Supreme Court of the United States* (1928), pp. 142, 152, 196; Cardozo, *The Nature of the Judicial Process* (1921), pp. 71, 83, 88; *The Growth of the Law* (1924), pp. 73-74, 104, 105-106; *The Paradoxes of Legal Science* (1928), p. 99; Stone, *Law and Its Administration* (1924), pp. 142-143; *Fifty Years' Work of the Supreme Court* (1928), 14 A. B. A. Journ. 428; Reed, *Stare Decisis and Constitutional Law* (1938), No. 35 Penna. Bar Ass'n Quarterly, 131, 141, 142-143, 149; Frankfurter, *Mr. Justice Holmes' Constitutional Opinions* (1923), 36 Harv.

III

IT IS WITHIN THE JUDICIAL POWER, IN CONSTRUING THE FOURTEENTH AMENDMENT, TO DECIDE THAT RACIAL SEGREGATION IN PUBLIC SCHOOLS IS UNCONSTITUTIONAL

Question 3 reads as follows:

On the assumption that the answers to questions 2 (a) and (b)⁴⁷ do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

In the cases at bar the plaintiffs seek an adjudication of their claim that rights secured to them by the Constitution are violated by the maintenance of separate schools for white and colored children. Question 3, as we understand it, requests counsel to consider whether this claim is of such a nature that it falls within the exclusive province of the political branches of government

L. Rev. 909, 917, 920; *Mr. Justice Holmes and the Supreme Court* (1938), pp. 8, 75; *Law and Politics* (1939), pp. 13, 48, 91, 99, 192, 196; Douglas, *Stare Decisis* (1949), pp. 9, 12; Jackson, *The Struggle for Judicial Supremacy* (1941), pp. 23, 174; *Full Faith and Credit* (1945), pp. 42-43, 58.

⁴⁷ Question 2 is:

"If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment

"(a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or

"(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?"

and cannot properly be entertained and decided by the federal courts. In his opinion for the district court in the *Briggs* case, Chief Judge Parker stated that racial segregation in public schools of the states presents "not questions of constitutional right but of legislative policy * * *. The federal courts would be going far outside their constitutional function were they to attempt to prescribe educational policies for the states in such matters, however desirable such policies might be in the opinion of some sociologists or educators. For the federal courts to do so would result, not only in the interference with local affairs by an agency of the federal government, but also in the substitution of the judicial for the legislative process in what is essentially a legislative matter." (No. 1, R. 186-187.)

1. It is respectfully submitted that the constitutional question before this Court is not the same as that before a state legislature considering whether, solely as a matter of educational and social policy, a system of racially separate or mixed schools should be established. If the Fourteenth Amendment leaves a state entirely free to choose whichever system it considers desirable and beneficial for its people, then, of course, no federal court can substitute its judgment for the choice made by the state. The question presented here, however, is whether the Amendment does give such a freedom of choice to a state. This is a question not of legislative

policy but of constitutional power—and it is a question which under our system of government must ultimately be determined by this Court on the basis of its construction of the Fourteenth Amendment.

The plaintiffs in these cases contend that the Amendment should be construed as withdrawing from a state, in providing public education to its citizens, the authority to make legal distinctions based solely on race or color. The defendants, on the other hand, argue that this Court's decisions interpreting the Amendment have established the right of a state to maintain separate schools for white and colored pupils, provided the facilities for education offered to all are substantially equal. The dispute in these cases thus centers on the proper construction to be given the Fourteenth Amendment. The judicial function here is not to review the wisdom of a state's policy favoring segregation in education but rather to determine its constitutional power to adopt such a policy. Such a task clearly falls within the traditional authority and competence of this Court.

The authority under which federal courts act in enforcing rights secured by the Constitution is derived from the Constitution itself. Article III of the Constitution vests the "judicial Power of the United States" in the Supreme Court and the lower federal courts established by Congress, and provides that the judicial power so vested

“shall extend to all Cases, in Law and Equity, arising under this Constitution * * *.” The right asserted by the plaintiffs in these cases arises under the Constitution, and the relief prayed for (*i. e.*, decrees enjoining continuation of the defendants’ allegedly unconstitutional practices) is of the sort which Anglo-American courts of equity have granted for centuries.

2. The judicial power is not lessened because the right invoked arises under the Fourteenth Amendment. Section 5 of the Amendment, which empowers Congress to enforce its provisions by appropriate legislation, neither expressly nor impliedly limits the independent power of this Court to vindicate, through appropriate judicial proceedings and remedies, rights guaranteed by the Amendment. In countless cases, too numerous for citation here, the Court has construed the Amendment of its own force, without any implementing act of Congress, as requiring judicial invalidation of state action found to infringe rights protected by the Amendment. In the vast majority of these cases no act of Congress was involved or even suggested. If it should now be held, for the first time since its adoption in 1868, that the power of this Court to enforce the Fourteenth Amendment depends on the enactment of implementing legislation by Congress, literally scores of decisions would have to be overruled. Among these would be the most recent applications of the Amendment to racial discrim-

inations in public education: *Sweatt v. Painter*, 339 U. S. 629; *McLaurin v. Oklahoma State Regents*, 339 U. S. 637; *Sipuel v. Board of Regents*, 332 U. S. 631; *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337. If one who claims that his right to equality in the enjoyment of public educational benefits has been violated must present his claim to Congress rather than the courts, then all of these cases—in which violation of that right was found and appropriate judicial relief granted—were erroneously decided.

Congress has, of course, exercised to some extent its power to enforce the Fourteenth Amendment. It has provided criminal and civil sanctions for violation of rights secured by the Amendment (18 U. S. C. 241-243; 8 U. S. C. 41-48; cf. *Screws v. United States*, 325 U. S. 91; *Williams v. United States*, 341 U. S. 97), and it has conferred jurisdiction on the federal district courts to redress violations of such rights (28 U. S. C. 1343). Referring to the federal statute prohibiting disqualification of jurors in federal and state cases because of race, color, or previous condition of servitude (18 Stat. 336, 8 U. S. C. 44), the Court recently observed in *Fay v. New York*, 332 U. S. 261, 282-283 (the "blue ribbon" jury case):

For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of illegal discrimination.

In the *Fay* opinion (p. 283) the Court noted that in *Ex parte Virginia*, 100 U. S. 339, 345, one of the earliest cases arising under the Fourteenth Amendment, it was "hinted that there might be no judicial power to intervene except in matters authorized by Congress." The question in *Ex parte Virginia*, however, was whether the Fourteenth Amendment empowered Congress to enact 18 Stat. 336, the Act cited above; no question was involved as to the independent judicial power to enforce the Amendment. It was decided on the same day as *Virginia v. Rives*, 100 U. S. 313, and the opinions for the Court in both cases were delivered by Mr. Justice Strong. In the latter case the opinion expressly stated (p. 322) that "Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court." And the decisions of this Court have established beyond any possible doubt that its "revisory powers" to invalidate violations of the Fourteenth Amendment extend to every kind of state action, whether judicial, legislative, or executive, civil or criminal, substantive or procedural.

If any exception from this general principle is now to be carved out, so that this Court will decline to exercise its power to enforce the Amendment where the plaintiff is a Negro child complaining that his constitutional right to equal protection of the laws has been violated by a state law compelling him to attend a segregated school, such an exception could not be justified by precedent.

The "hint" in *Ex parte Virginia* was never followed in subsequent cases. It cannot today be regarded as raising any serious question as to this Court's power and obligation to enforce all rights arising under the Fourteenth Amendment, without awaiting exercise of the independent enforcement power granted Congress in Section 5. When a litigant claims that a state law denies him due process or equal protection, this Court does not remand the case to Congress for remedial action. If the claim is sustained, the Court grants appropriate judicial relief. Congress and the Court have concurrent power, each within its own proper sphere, to enforce the Fourteenth Amendment. Judicial remedies are specific and directed to particular cases and parties; legislative remedies are necessarily general. An available judicial remedy for violation of the Amendment cannot be, and has never been, withheld merely because Congress has not found it necessary to enact general remedial legislation.

3. Of the rights arising under the Amendment which this Court has enforced, none has received more consistent and solicitous judicial vindication than the right to equality before the law and to be free from governmental discriminations based on race or color. The familiar test of the constitutionality of a legislative classification is whether it has a reasonable basis. *Railway Express v. New York*, 336 U. S. 106, 110. But reasonableness is not measured in the abstract; the standard of rea-

sonableness is found in the provisions and policy of the Fourteenth Amendment. And that Amendment, as is demonstrated by its history (see pp. 112-116, *supra*) and by decisions of this Court extending from the *Slaughter-House Cases*, 16 Wall. 36, 81, to the *Sweatt* and *McLaurin* cases, 339 U. S. 629, 637,⁴⁸ has made it unreasonable and

⁴⁸ The consistency of the Court's position deserves fuller exposition:

Slaughter-House Cases, 16 Wall. 36, 71:

"[N]o one can fail to be impressed with the one pervading purpose found in * * * all [of the reconstruction amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited domination over him. * * *

Strauder v. West Virginia, 100 U. S. 303, 306-307:

"This [the Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. * * * It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. * * * What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? * * *

Virginia v. Rives, 100 U. S. 313, 318:

"The plain object of these statutes [the civil rights laws enacted by Congress under the Fourteenth Amendment], as

unconstitutional, at least in the absence of compelling reasons of national security, for a state to establish or enforce legal distinctions based on race or color. Even though other types of legislative classifications are valid if found to have a rational basis, the Court not only refuses to give laws imposing racial distinctions a presumption of constitutionality but regards them as at least *prima facie* unconstitutional. In *Korematsu v. United States*, 323 U. S. 214, 216, the Court said:

of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same."

Ex parte Virginia, 100 U. S. 339, 344-345:

"One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights * * *. They were intended to take away all possibility of oppression by law because of race or color."

Neal v. Delaware, 103 U. S. 370, 389:

"The question thus presented is of the highest moment to that race, the security of whose rights of life, liberty, and property, and to the equal protection of the laws, was the primary object of the recent amendments to the national Constitution."

Plessy v. Ferguson, 163 U. S. 537, 544:

"The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law * * *."

Maxwell v. Dow, 176 U. S. 581, 592:

"[T]he primary reason for that [Fourteenth] amendment was to secure the full enjoyment of liberty to the colored race * * *."

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

The standard of reasonableness established by the Fourteenth Amendment is necessarily flexible

Buchanan v. Warley, 245 U. S. 60, 76:

"[A] principal purpose of the * * * Amendment was to protect persons of color * * *."

Nixon v. Herndon, 273 U. S. 536, 541:

"That Amendment [the Fourteenth], while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them. * * * States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case [to vote at a state primary election]."

Shelley v. Kraemer, 334 U. S. 1, 23:

"The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind."

and dynamic. Changing conditions can make unjustifiable and unconstitutional today that which yesterday may have been entirely justifiable and constitutional. In *Wolf v. Colorado*, 338 U. S. 25, 27, the Court said of the due process clause of the Fourteenth Amendment:

It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

Cf. *Euclid v. Amber Realty Co.*, 272 U. S. 365, 387, where the Court observed that the application of constitutional guarantees "must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise."

It would be idle, therefore, to speculate whether the principle of equality before the law was violated by the continuation or establishment shortly after the Civil War in many states of separate schools for the children of the newly-freed slaves. Had the issue been raised, constitutional justification for such action might conceivably have been found in the illiteracy and retarded social and economic status of a race so recently liberated from the bonds of slavery, as well as in the rudimentary and inadequate character of then-existing

public school systems, which might have made it impracticable to teach the two races in the same classes. Moreover, school attendance was not generally compulsory then, as it is now. (See pp. 9, 110, *supra*.) The question now before the Court is not whether conditions existing when these school systems began may have justified them, practically and legally. The question, rather, is whether, under the far different conditions existing today, a legal requirement that colored children must attend public schools where they are segregated solely because of their color deprives them of their constitutional right to equality in the enjoyment of public educational advantages and opportunities.

4. The judicial inquiry, it must be emphasized, is not simply to determine whether there is equality as between schools: the Constitution requires that there be equality as between *persons*. The Fourteenth Amendment compels a state to grant the benefits of public education to all its people equally, without regard to differences of race or color. This has not always been as clear as it is today. Prior to this Court's decision in 1938 in *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, it could plausibly have been contended, in reliance on cases decided before then, that because public education is a "privilege" furnished at the pleasure of the state and maintained by local taxation, the Fourteenth Amendment does not impose any limitation (apart from a require-

ment that separate schools must be physically equal) on the state's discretion to prescribe the terms and conditions on which such privilege is granted. Thus, in the first case in this Court involving a claim under the Fourteenth Amendment that a state's public educational system was unconstitutional, *Cumming v. Board of Education*, 175 U. S. 528, decided in 1899, the Court in an opinion by Mr. Justice Harlan, who had dissented so vigorously in *Plessy v. Ferguson*, 163 U. S. 537, stated (p. 545):

* * * while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

⁴⁹ See also *Berea College v. Kentucky*, 211 U. S. 45, where the Court upheld a state statute making it unlawful for a state-chartered corporation to operate a private school where white and colored pupils are taught together. Harlan, J., dissented on the ground that the statute was inconsistent with "the great principle of the equality of citizens before the law." (p. 69.) He was careful to add, however: "Of course what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the State and maintained at the public expense. No such question is here presented and it need not be now discussed." (*Id.*)

Similarly, in *Gong Lum v. Rice*, 275 U. S. 78, decided in 1927, the Court dealt with the question "whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black" (p. 85). Answering this question in the negative, the Court, in an opinion by Mr. Chief Justice Taft, held that "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear" (*ibid.*), citing and quoting from the *Cumming* case.

Mr. Chief Justice Taft's opinion in *Gong Lum* stated (pp. 85-86): "Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution." In support of this statement were cited fifteen cases, none of them decided by this Court. Twelve were state cases, beginning with *Roberts v. City of Boston*, 5 Cush. (Mass.) 198, decided in 1850, eighteen years before the Fourteenth Amendment was adopted. At least some of these cases expressed the view that control over public education is a subject-matter inherently within a state's police power, and that the Fourteenth Amendment imposes no limitation on its power in that regard.

E. g., State ex rel. Stoutmeyer v. Duffy, 7 Nev. 342, 346; *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 209; *Cory v. Carter*, 48 Ind. 327, 360.

In *Missouri ex rel. Gaines v. Canada*, *supra*, however, this Court unequivocally dispelled any notion that because public education is provided as a matter of "privilege" rather than of right, the state has full discretion to determine the terms and conditions on which such privilege is granted. The Court, speaking through Mr. Chief Justice Hughes, said (305 U. S. at pp. 349-350):

The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to Negroes by reason of their race. * * * That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up * * *.

As we read its opinion, the Court in the *Gaines* case made it clear that its function in cases of this type is not limited to appraising questions of fact concerning the physical equality of schools or facilities, and that its primary concern is whether the *individual* is being denied, because of

race or color, equality of treatment in the opportunities, advantages, and benefits offered by the state. In that case the Court decided that a legal education—assumedly equal in quality—offered in schools outside the state did not meet the required standard of personal equality of right when contrasted with the privilege, afforded only to white students, of legal education in a school within the state. That this was a departure from the approach taken in the *Cumming* and *Gong Lum* cases is indicated by the dissenting opinion of Mr. Justice McReynolds (305 U. S. at 353-354), who unsuccessfully invoked those cases to support his view that “the settled legislative policy of the State” for “separation of whites and Negroes in schools” should not be upset by the Court.⁸⁰

⁸⁰ In *Atkin v. Kansas*, 191 U. S. 207, 222, the Court had stated that “it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities.” This principle was applied in *Heim v. McCall*, 239 U. S. 175, to uphold the validity of a state law excluding aliens from employment on public works, the Court declaring (pp. 191-193) that regulations on this subject involve only considerations of public policy with which the courts have no concern. To the extent that these cases hold that the prohibitions of the Fourteenth Amendment do not apply at all to public employment because it is a “privilege” wholly subject to the discretion of the state, they have been limited by *Wieman v. Updegraff*, 344 U. S. 183, 191-192, and *United Public Workers v. Mitchell*, 330 U. S. 75, 100, as well as by the cases cited in the text.

Following the *Gaines* case came *Sipuel v. Board of Regents*, 332 U. S. 631; *Sweatt v. Painter*, 339 U. S. 629; and *McLaurin v. Oklahoma State Regents*, 339 U. S. 637. Those cases emphasized the personal character of the right to equal protection of the laws. In *Sweatt* and *McLaurin*, the Court directed its attention to the individual plaintiff, and appraised the educational opportunities afforded by the state solely in terms of their value to him, considering all the conditions (tangible and intangible) on which they were offered. In those cases the Court, looking beyond any claimed physical equality of the facilities furnished, found a denial of the plaintiff's constitutional right to equal treatment. Thus, in the *McLaurin* case, a Negro graduate student was furnished an education not only equal but identical to that offered whites, but he was subjected to such segregated treatment because of his color that this Court, advertent to psychological and sociological considerations such as are urged here, ordered that he be treated completely without reference to his color (p. 642):

We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws. See *Sweatt v. Painter*, ante, p. 629. We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race. Appellant, having been

admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races.

In one of the cases at bar, No. 1, the *Kansas* case, the district court found (R. 245-246) that racial segregation in public schools has a detrimental effect on colored children; that it affects their motivation to learn; and that it has a tendency to retard their educational and mental development and to deprive them of benefits they would receive in an integrated school system. The opinions in the *Sweatt* and *McLaurin* cases, 339 U. S. at 633-635 and 641-642, show that similar considerations were found persuasive by the Court in concluding that the plaintiffs in those cases were denied the equality of right secured them by the Fourteenth Amendment. In neither of those cases is there any suggestion that the question presented is not justiciable; or that it involves the determination of matters of educational or social policy outside the judicial power; or that the constitutional question of segregation in higher education is in any respect different from segregation in elementary and high schools.

5. Finally, it is clear that the cases at bar do not involve "political questions" beyond the authority and competence of federal courts to decide. The Court has clearly marked out the types of questions which it will not undertake to adjudicate because their nature is such as to make them

exclusively the concern of the political departments. Thus, the federal courts will decline to determine whether and when a state of war exists, leaving such questions to the legislative and executive branches of government. *The Protector*, 1 Wall. 700. Similarly, the constitutional responsibility of each house of Congress to be "the Judge of the Elections, Returns and Qualifications of its own Members" (Article I, section 5) implies a corollary lack of authority in the courts to deal with such "political" questions as apportionment. *Colegrove v. Green*, 328 U. S. 549; cf. *Giles v. Harris*, 189 U. S. 475. And, of course, it has long been settled that it is not part of the federal judicial function to enforce the guarantee of Article IV, section 4, that every state shall have a republican form of government. *Luther v. Borden*, 7 How. 1; *Georgia v. Stanton*, 6 Wall. 50; *Pacific States Telephone and Telegraph Co. v. Oregon*, 223 U. S. 118.

None of the considerations governing those cases is applicable here. Determination of the constitutional question presented in the instant cases would in no respect conflict with, or intrude upon, any power which the Constitution vests in the Congress or the President. Indeed, as is evidenced by the countless decisions of this Court enforcing the Fourteenth Amendment, the principal responsibility for vindicating rights secured by that Amendment has properly been assumed by the judiciary. A decision that racial segre-

tion in public elementary and high schools is unconstitutional would be no more "political" or "legislative" than those which have ended segregation in higher levels of public education. *Sweatt v. Painter, supra; McLaurin v. Oklahoma State Regents, supra.*

In answer to any contention that this Court lacks the competence to decide the question of constitutional interpretation which has been placed before it in these cases, we call to mind its words in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 638, 639-640:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. * * *

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. * * * [C]hanged conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

IV

IF THE COURT HOLDS THAT RACIAL SEGREGATION IN PUBLIC SCHOOLS IS UNCONSTITUTIONAL, IT HAS POWER TO DIRECT SUCH RELIEF AS IN ITS JUDGMENT WILL BEST SERVE THE INTERESTS OF JUSTICE IN THE CIRCUMSTANCES

Question 4 reads as follows:

Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

This question assumes that the Court will hold that the plaintiffs in these cases have a constitutional right not to be excluded, solely because of their color, from schools which they would otherwise be allowed to attend. The question is addressed solely to the Court's power to fashion an appropriate remedy. Is its power so limited that, if it finds that racial segregation in public schools is unconstitutional, it must necessarily enter decrees requiring immediate admission of the plaintiffs to nonsegregated schools—or can it direct some other form of relief? The alternative type of

relief suggested by the Court's question is to "permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions."

In dealing with question 5, *infra*, pp. 170-185, we shall consider the problems which may arise, at least in some areas, in giving effect to a decision that segregation in public schools is unconstitutional. We shall there discuss the question whether, and to what extent, it would be equitable and in the public interest for the Court to enter decrees in these cases requiring that Negro children should "forthwith" be admitted to nonsegregated schools.

The shaping of relief in the present cases involves reference to three fundamental principles governing the granting of judicial remedies, each of which is to some degree applicable here: (1) One whose legal rights have been and continue to be violated is entitled to relief which will be effective to redress the wrong. If a court finds that certain conduct is unlawful, it normally enters a decree enjoining the continuation of such conduct. (2) A court of equity is not inflexibly bound to direct any particular form of relief. It has full power to fashion a remedy which will best serve the ends of justice in the particular circumstances. (3) In framing its judgment a court must take into account not only the rights of the parties but the public interest as well. The needs of the public, and the effect of proposed decrees

on the general welfare, are always of relevant, if not paramount, concern to a court of justice.

The principal problem here, as so often in the law, is to find a wise accommodation of these principles as applied to the facts presented. "The essential consideration is that the remedy shall be as effective and fair as possible in preventing continued or future violations of the [law] in the light of the facts of the particular case." *United States v. National Lead Co.*, 332 U. S. 319, 335. But, whatever the difficulties of determining what remedy would be most effective and fair in redressing the violation of constitutional right presented in these cases, we believe there can be no doubt of the Court's *power* to grant such remedy as it finds to be most consonant with the interests of justice.

Congress has expressly empowered the Court, in dealing with cases coming before it, to enter "such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U. S. C. 2106. The breadth of this power, and the flexibility of judicial remedies which it permits the Court to utilize, have been demonstrated in a great variety of situations. See *Minnesota v. National Tea Co.*, 309 U. S. 551, 555; *Eccles v. Peoples Bank*, 333 U. S. 426, 431; *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 132; *Addison v. Holly Hill Co.*, 322 U. S. 607, 620, 622; *Hecht Co. v. Bowles*, 321 U. S. 321, 329-

330; *Alexander v. Hillman*, 296 U. S. 222, 239; *Atlantic Coast Line v. Florida*, 295 U. S. 301, 316; *Central Kentucky Co. v. Railroad Commission*, 290 U. S. 264, 271; *Union Pacific Railway Co. v. Chicago, &c. Railway Co.*, 163 U. S. 564, 600-601; and see Story, *Equity Jurisprudence* (14th ed.), §§ 28, 578; Pomeroy, *Equity Jurisprudence* (5th ed.), §§ 111, 170, 175a. In *Hecht Co. v. Bowles*, *supra*, this Court said (pp. 329-330):

The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

In *Addison v. Holly Hill Co.*, *supra*, at 619, the Court emphasized that where governmental action has been in violation of law, the judicial task is to seek a disposition which "is most consonant with justice to all interests in retracing the erroneous course that has been taken." Commenting upon *United States v. Morgan*, 307 U. S. 183, and other instances of judicial adaptation of conventional remedies to meet the needs of unusual situations, the Court said (pp. 620, 622):

The creative analogies of the law were drawn upon by which great equity judges, exercising imaginative resourcefulness,

have always escaped the imprisonment of reason and fairness within mechanical concepts of the common law. * * *

* * * * *

In short, the judicial process is not without the resources of flexibility in shaping its remedies, though courts from time to time fail to avail themselves of them.

Where public interests are involved, equitable powers "assume an even broader and more flexible character than when only a private controversy is at stake." *Porter v. Warner Co.*, 328 U. S. 395, 398; and see *Radio Station WOW, Inc. v. Johnson*, *supra*, at 132; *Yakus v. United States*, 321 U. S. 414, 441; *Hecht Co. v. Bowles*, *supra*, at 329-330; *Mercoird Corp. v. Mid-Continent Co.*, 320 U. S. 661, 670; *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496, 500; *Inland Steel Co. v. United States*, 306 U. S. 153, 157; *Virginian Railway Co. v. System Federation*, 300 U. S. 515, 552; *Beasley v. Texas and Pacific Ry. Co.*, 191 U. S. 492, 498.

In habeas corpus cases arising out of criminal and deportation proceedings the Court has framed its relief to permit correction of illegality where possible, instead of directing immediate or outright discharge of the petitioner. Thus, in *In re Bonner*, 151 U. S. 242, where the trial court had exceeded its jurisdiction in sentencing the petitioner, the Court delayed his discharge in order to afford opportunity for the court to correct its error. The Court held that Section 761 of the

Revised Statutes (now contained in 28 U. S. C. 2243), authorizing "the court * * * to dispose of the party as law and justice require," invested it "with the largest power to control and direct the form of judgment to be entered in cases brought up before it on *habeas corpus*" (p. 261). And see *Medley, Petitioner*, 134 U. S. 160. Similarly, in *Mahler v. Eby*, 264 U. S. 32, where the Court held that a warrant of deportation was defective, it stated that "We need not discharge the petitioners at once because of the defective warrant" (p. 45). To the same effect are *Tod v. Waldman*, 266 U. S. 113, and *Butterfield v. Zydok*, 342 U. S. 524, 546-47.⁵¹

In granting relief in civil cases against a practice or condition found to be unlawful, courts have frequently suspended the operation of their decrees on grounds of inconvenience to the public or undue hardship to the wrongdoer, and have allowed sufficient time for removing the illegality. Thus, in *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, an original bill in equity by Georgia to enjoin the defendant copper companies from dis-

⁵¹ Compare *United States v. Morgan*, 307 U. S. 183, holding that where an order of the Secretary of Agriculture fixing stockyard rates was void for procedural defects but there was no judicial determination of the reasonableness of the rates fixed by the order, the money representing the difference between the rates in effect and the lower rates of the order should be retained in the registry of the District Court to await a further and valid determination of reasonable rates by the Secretary.

charging noxious gas from their works in Tennessee over Georgia's territory, the Court, in an opinion by Mr. Justice Holmes, held that, notwithstanding that the defendants' activities were unlawful, an injunction would issue "after allowing a reasonable time to the defendants to complete the structures that they are now building, and the efforts that they are making to stop the fumes" (p. 239).⁵² Cf. *Harrisonville v. Dickey Clay Co.*, 289 U. S. 334; *Great Central Ry v. Doncaster Rural Council*, 87 L. J. R. N. S. 80;⁵³ *Gregory v. Crain*, 291 Ky. 194; *City of San Diego v. Van Winkle*, 69 Cal. App. 2d 237, 241.⁵⁴

⁵²Although the decision was rendered in 1907, the matter was still before the Court in 1916. See 237 U. S. 474, 678, and 240 U. S. 650.

⁵³Other English cases, each involving abatement of a nuisance, are: *City of Manchester v. Farnworth* [1930] A. C. 171, 185; *Attorney General v. Birmingham*, 4 Kay & J. 528, 541, 547-548 (1858); *Attorney-General v. Proprietors of the Bradford Canal*, L. R. 2 Eq. 71 (1866); *Attorney-General v. Colney Hatch Lunatic Asylum*, 4 Ch. App. 146, 165-166 (1868); *Attorney General v. Corporation of Halifax*, 39 L. J. Ch. N. S. 129 (1869); *North Staffordshire Ry. Co. v. Board of Health*, 39 L. J. Ch. N. S. 131 (1870); *Attorney-General v. Finchley Local Board*, 3 Times L. R. 356 (1887). See also 1 Seton, *Judgments and Orders* (7th ed.), p. 612.

⁵⁴Other state cases in which the effective date of an injunction was suspended to permit time for necessary readjustment, most of them involving abatement of a nuisance, are: *Harding v. Stamford Water Co.*, 41 Conn. 87; *Stovern v. Town of Calmar*, 204 Ia. 983, 986; *Caretti v. Broring Building Co.*, 150 Md. 198, 210-211; *Brehm v. Richards*, 152 Md. 126, 136-137; *Baltimore v. Brack*, 175 Md. 615; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396, 401; *Breed v. City of Lynn*, 126 Mass. 367, 370; *Suburban Land Co., Inc.*

In the field of monopolies and illegal combinations federal courts have regarded their powers to be of sufficient flexibility to permit elimination of unlawful practices to take place over a reasonable period of time. Cf. *Northern Securities Co. v. United States*, 193 U. S. 197, 360.⁸⁵ Thus, where a violation of the antitrust laws has persisted over a long period of time, resulting in a tangled complex of economic arrangements tainted with illegality, it is recognized that a decree calling for complete elimination of the illegal arrangements overnight would, in the particular circumstances, be impracticable. See, for example, the provisions for dissolution of the illegal combinations involved in the *Tobacco, Standard*

v. Billelica, 314 Mass. 184, 194; *Gundy v. Village of Merrill*, 250 Mich. 416; *Lohman v. The St. Paul, etc. R. R. Co.*, 18 Minn. 174; *Doremus v. Mayor and Aldermen of Paterson*, 79 N. J. Eq. 63; *State v. White*, 90 N. J. Eq. 621; *Chapman v. City of Rochester*, 110 N. Y. 273; *Moody v. Village of Saratoga Springs*, 17 App. Div. (N. Y.) 207, affirmed, 163 N. Y. 581; *Sammons v. City of Gloversville*, 34 Misc. (N. Y.) 459; *Bailey v. City of New York*, 38 Misc. (N. Y.) 641; *French v. Chapin-Sacks Mfg. Co.*, 118 Va. 117; *Town of Purcellville v. Potts*, 179 Va. 514, 524, 525; *Winchell v. City of Waukesha*, 110 Wis. 101. See Pomeroy's *Eq. Rem.* (1905), §§ 531, 535; Beach, *Injunctions* (1895), §2; *High on Injunctions* (4th ed.), § 746.

⁸⁵ There the Court, in speaking generally of remedies in a civil antitrust suit, said (p. 360) :

"This, it must be remembered, is a suit in equity * * *; and the court, in virtue of a well settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results—such results as law and justice demand."

Oil and Motion Picture cases.⁵⁶ The decree entered in the *Tobacco* case furnishes a useful precedent and guide to the disposition of the present cases, and for that reason we quote at length from the Court's opinion there (pp. 185, 187-188):

* * * In considering the subject [of relief] * * * three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning. * * *

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⁵⁶ *United States v. American Tobacco Co.*, 221 U. S. 106, 191 Fed. 371 (S. D. N. Y.); *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. Paramount Pictures*, 70 F. Supp. 53, 74-75 (S. D. N. Y.), 334 U. S. 131, 85 F. Supp. 881, 899, 339 U. S. 974. See also *United States v. National Lead Co.*, 332 U. S. 319, 329-335, 363; *United States v. Aluminum Co.*, 322 U. S. 716, 148 F. 2d 416 (C. A. 2), 171 F. 2d 285, 91 F. Supp. 333, 419 (S. D. N. Y.); *United States v. International Harvester Co.*, 214 Fed. 987 (D. Minn.), 274 U. S. 693.

* * * Under these circumstances, taking into mind the complexity of the situation in all of its aspects and giving weight to the many-sided considerations which must control our judgment, we think, so far as the permanent relief to be awarded is concerned, we should decree as follows: 1st. That the combination in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately, be decreed to be in restraint of trade and an attempt to monopolize and a monopolization within the first and second sections of the Antitrust Act. 2d. That the court below, in order to give effective force to our decree in this regard, be directed to hear the parties, by evidence or otherwise, as it may be deemed proper, for the purpose of ascertaining and determining upon some plan or method of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law. 3d. That for the accomplishment of these purposes, taking into view the difficulty of the situation, a period of six months is allowed from the receipt of our mandate, with leave, however, in the event, in the judgment of the court below, the necessities of the situation require, to extend such period to a further time not to exceed sixty days. 4th. That in the event, before the expiration of the period thus fixed, a condition of disintegra-

tion in harmony with the law is not brought about, either as the consequence of the action of the court in determining an issue on the subject or in accepting a plan agreed upon, it shall be the duty of the court, either by way of an injunction restraining the movement of the products of the combination in the channels of interstate or foreign commerce or by the appointment of a receiver, to give effect to the requirement of the statute.⁵⁷

Cf. *Standard Oil Co. v. United States*, 221 U. S. 1, where this Court directed extension of the time for executing the decree from a period of thirty days to at least six months, "in view of the magnitude of the interests involved and their complexity" (p. 81).⁵⁸

⁵⁷ A plan was formulated under the supervision of the district court at a series of conferences extending for a period of more than two months. A hearing was held on the plan at which not only the parties but also any person who wished to express his views as a friend of the court was given an opportunity to do so. See 191 Fed. at 373. In the decree approving the plan it was adjudged that it "will recreate out of the elements now composing it [the illegal combination] a new condition which will be honestly in harmony with, and not repugnant to, the law, and without unnecessary injury to the public or the rights of private property." The decree also gave the defendants an extension of the period for carrying the plan into execution and provided for retention of jurisdiction by the court "for the purpose of making such other and further orders and decrees, if any, as may become necessary for carrying out the mandate of the Supreme Court." 191 Fed. at 428, 430-431.

⁵⁸ In the *International Harvester* case (214 Fed. 987 (D. Minn.)), the court directed that "the entire combina-

The Court has expressed a reluctance to enter decrees which would involve the judiciary in the administration of complex and detailed matters: "The judiciary is unsuited to affairs of business management; and control through the power of contempt is crude and clumsy and lacking in the flexibility necessary to make continuous and detailed supervision effective." *United States v. Paramount Pictures*, 334 U. S. 131, 163; see also *Brown v. Board of Trustees*, 187 F. 2d 20, 25 (C. A. 5). It is clear, however, that this goes to the exercise of the Court's discretion and not to its power to act in such situations. The choice whether or not the courts are to be thrust into a system involving difficult policing problems "should not be faced unless the need for the system is great and its benefits plain." *United States v. Paramount Pictures*, *supra*, at 164. The

tion and monopoly be dissolved, that the defendants have 90 days in which to report to the court a plan for the dissolution of the entire unlawful business into at least three substantially equal, separate, distinct, and independent corporations," and it was further provided that "in case the defendants fail to file such plan within the time limit the court will entertain an application for the appointment of a receiver for all the properties of the corporate defendants, and jurisdiction is retained to make such additional decrees as may become necessary to secure the final winding up and dissolution of the combination and monopoly complained of * * *" (214 Fed. at 1001). The decree was entered in August 1914 and modified in October of that year. In November 1918 a consent decree was entered, and in 1927 this Court affirmed dismissal of a supplemental petition of the Government for further relief in the case. See 274 U. S. 693.

Court, in rejecting the argument that it should not act because it would be required to embark upon an enterprise involving burdensome administrative functions, said in *Nebraska v. Wyoming*, 325 U. S. 589, 616: "The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution." See also *Joy v. St. Louis*, 138 U. S. 1, 47; *Southern R. Co. v. Franklin &c. C. R. Co.*, 96 Va. 693; *Harper v. Railway Co.*, 76 W. Va. 788, 794; Pomeroy, *Equitable Remedies* (1905) § 761. In *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237 U. S. 474, 678, the Court did not hesitate to enter a decree which involved it deeply in the details of effective enforcement.

It may be contended, however, that the powers of a court of equity are not so comprehensive where vindication of the constitutional right to equal protection of the laws is involved. Such right, the Court has pointedly observed, is "personal and present." *Sweatt v. Painter*, 339 U. S. 629, 635; *McLaurin v. Oklahoma State Regents*, 339 U. S. 637, 642; *Shelley v. Kraemer*, 334 U. S. 1, 22; *Sipuel v. Board of Regents*, 332 U. S. 631, 633; *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 351; *McCabe v. Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 161-162. Thus a complainant must show that his own rights have been unconstitutionally impaired; it is not sufficient for him to establish that the rights of others have been

affected (*McCabe v. Atchison, T. & S. F. Ry. Co.*). Similarly, it is no answer to a particular plaintiff's claim to say that at some time in the future he will receive the equality of treatment which is his constitutional right (*Sipuel v. Board of Regents*). So, too, in the present cases, the plaintiffs could well say that, as individuals whose constitutional rights have been and are continuing to be violated, it affords them inadequate redress to enter decrees providing only that at some time in the future (perhaps after they are too old themselves to enjoy the benefits of the Court's decision) colored children as a group must be given public education on a non-segregated basis. For these plaintiffs the remedy of immediate admission to non-segregated schools is an indispensable corollary of the constitutional right, for to recognize a litigant's right without affording him an adequate remedy for its violation is to nullify the value of the right.

On the other hand, it is also true that the constitutional issues presented to the Court transcend the particular cases and complainants at bar, and in shaping its decrees the Court may take into account such public considerations as the administrative obstacles involved in making a general transition throughout the country from existing segregated school systems to ones not based on color distinctions. If the Court should hold in these cases that racial segregation *per se* violates the Constitution, the immediate consequence

would be to invalidate the laws of many states which have been based on the contrary assumption. Racial segregation in public schools is not an isolated phenomenon limited to the areas involved in the cases at bar, and it would be reasonable and in accord with its historic practices for the Court in fashioning the relief in these cases to consider the broad implications and consequences of its ruling.

The "personal and present" language appears in cases involving education on the professional and graduate levels. Each case involved a single plaintiff. It is one thing to direct immediate relief where a single individual seeks vindication of his constitutional rights in the relatively narrow area of professional and graduate school education, and an entirely different matter to follow the same course in the broad area of public school education affecting thousands of children, teachers, and schools. We do not think that when the Court in those cases characterized the right to equal protection of the laws as "personal and present", it was thereby rejecting the applicability, to cases involving the right, of settled principles governing equitable relief.⁵⁰ On the con-

⁵⁰ This Court long ago cautioned "that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." Chief Justice Marshall in *Cohens v.*

trary, the Court has recognized that such principles are equally applicable to litigation involving fundamental constitutional rights of individuals. Thus, in *McCabe v. Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, five Negro citizens brought suit to enjoin the defendant railroads from complying with the Oklahoma "Separate Coach Law" for the reason, among others, that it violated the Fourteenth Amendment. This Court, while it concluded that certain provisions of the law were unconstitutional, held that the complainants were not entitled to the relief sought because they did not show any injury to themselves (235 U. S. at 162, 164):

The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks. The bill is wholly destitute of any sufficient ground for injunction and unless we are to ignore settled principles governing equitable relief, the decree must be affirmed.

We conclude, therefore, that the Court has undoubted power in these cases to enter such decrees as it determines will be most effective and just in relation to the interests, private and public, affected by its decision.

Virginia, 6 Wheat, 264, 399. And see *Armour & Co. v. Wantock*, 323 U. S. 126, 132-133.

V

IF THE COURT HOLDS THAT RACIAL SEGREGATION IN PUBLIC SCHOOLS IS UNCONSTITUTIONAL, IT SHOULD REMAND THESE CASES TO THE LOWER COURTS WITH DIRECTIONS TO CARRY OUT THIS COURT'S DECISION AS SPEEDILY AS THE PARTICULAR CIRCUMSTANCES PERMIT

Question 5 is:

On the assumption on which questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),⁶⁰

(a) should this Court formulate detailed decrees in these cases;

(b) if so, what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

⁶⁰ Question 4 reads as follows:

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?"

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

This question is predicated on three assumptions: (1) that the Court will hold that racial segregation in public schools is unconstitutional; (2) that it can permit an effective gradual adjustment to be brought about from existing segregated school systems to ones not based on color distinctions; and (3) that the Court will exercise its equity powers to that end. The question which remains to be considered, therefore, is how the decrees in the present cases should be framed so as to give effective force to the Court's ruling on the constitutional question and at the same time to permit orderly solution of the problems which may arise in eliminating existing racial segregation in public schools.

In this concluding section of the brief, we discuss (a) the difficulties which may be met in carrying out transition to nonsegregated school systems, and (b) the various factors which appear to be relevant in framing the decrees in the cases at bar.

A. *Obstacles to Integration.* In carrying out an adjustment from existing segregated school systems to new ones not based on color distinctions, the difficulties likely to be encountered fall into two groups: (1) those of an administrative nature; (2) those deriving from the fact that racial segregation in public schools has been in existence for many years in a large part of the country.

1. It is not difficult to envisage some of the kinds of administrative problems which may arise in giving effect to a holding that separate school systems are unconstitutional. Such a decision will necessarily result in invalidation of provisions of constitutions, statutes, and administrative regulations in many states. In many areas existing boundaries of school districts may require extensive revision. School authorities may wish to give pupils a choice of attending one of several schools, a choice now prohibited. Schools may have to be consolidated, teachers and pupils transferred, teaching schedules revised, and transportation arrangements altered. In jurisdictions (*e. g.*, South Carolina, District of Columbia) where by statute the allocation of public school funds depends on the relative number of Negro and white children of school age, changes in the law may be required.⁶¹ In some jurisdictions (*e. g.*, District of Columbia, Maryland) it may be necessary to elim-

⁶¹ South Carolina Code (1952), §§ 21-251, 21-290; D. C. Code (1951 ed.), §§ 31-1110, 31-1112.

inate duplication of functions arising from the existence of separate sets of supervisory and administration officials for white and Negro schools.⁶² In states (*e. g.*, Mississippi, Texas) which have statutory provisions for separate training schools for Negro teachers, the law may require amendment.⁶³

It is not unlikely that in many communities, particularly where separate white and colored residential districts still exist, abolition of segregation would produce no serious dislocations, and no wholesale transfers of teachers or pupils would occur. This could result from purely geographical factors, because the pupils of a school ordinarily reflect the composition of the population of the district in which it is located. The extent of the administrative and legal changes required will thus vary in the different jurisdictions involved, depending on these and other factors which now cannot be evaluated or measured. Accordingly, it is impossible to determine at this time what specific period of time would be required to overcome the administrative obstacles to school integration in any particular area.

In this connection it should be noted that financial cost, which would play so large a role in any program for "equalization" of separate schools,

⁶² D. C. Code (1951 ed.), §§ 31-670, 31-671; Anno. Code of Maryland (Flack ed., 1951), Art. 77, §§ 42 (4), 208.

⁶³ Mississippi Code (1942 ed.), Art. 15, §§ 6808-6811; Vernon's Texas Civil Statutes, title 49, ch. 8.

furnishes no substantial obstacle to integration. As the Attorney General of Virginia stated in his brief on the merits filed last term in No. 4 (p. 21), "It is crystal clear that segregation is more expensive than amalgamation." It has been estimated that a capital outlay of as much as 2 billion dollars might be required in order to make the separate public schools for Negroes "equal", in a physical sense, to those now maintained for white pupils. On the basis of the 1949-50 level of *per capita* current expenditure for Negro pupils in the separate school areas, it has been estimated that it would take an additional \$134,824,000 to bring the Negro expenditure up to that for the white pupils, an increase of almost 70 per cent. To raise the cost of transporting Negro pupils at the 1949-50 level to a par with that of transporting white pupils would entail an additional \$55,574,582.⁴⁴

An additional economic consideration favoring integration results from recent changes in the number and relative proportion of Negroes in the areas which maintain separate public schools for colored children. During the last decade there have been significant changes in the distribution

⁴⁴ These estimates have been made by the Office of Education, Department of Health, Education and Welfare, on the basis of data contained in *Statistics of State School Systems 1949-1950*, being chapter 2 of the *Biennial Survey of Education in the United States (1948-1950)*, published by the Office of Education, and in the article *School Building Unit Costs* about to be published in *School Life*, an organ of the Office of Education.

of the Negro population of the country.⁶⁵ There has occurred a significant shift of Negroes from the Southern to the Northern, Central, and Western States. A decline in the number and proportion of Negroes in the population has taken place in West Virginia, Georgia, Kentucky, Alabama, Mississippi, Arkansas, and Oklahoma. The Middle Atlantic, East North Central, and Pacific States had the most appreciable increases in their Negro population, and the percentage increases for Negroes far exceeded those of the white population.⁶⁶

The financial burden of maintaining "separate but equal" public schools becomes increasingly onerous and unjustifiable as the Negro population in a particular area decreases. A community re-

⁶⁵ See S. Doc. No. 14, 83d Cong., 1st Sess., pp. 4-8.

⁶⁶ *Ibid.* The following table taken from data published by the Bureau of the Census shows the changes in Negro population in 17 Southern and border states and the District of Columbia:

	1940		1950	
	Non-whites	Percent non-white	Non-whites	Percent non-white
Delaware.....	35,977	13.5	44,207	13.9
Maryland.....	302,763	16.6	388,014	16.6
District of Columbia.....	188,765	28.5	284,031	35.4
Virginia.....	662,190	24.7	737,038	22.2
West Virginia.....	117,872	6.2	115,268	5.7
North Carolina.....	1,003,988	28.1	1,078,819	26.6
South Carolina.....	815,496	42.9	823,624	38.9
Georgia.....	1,085,445	34.7	1,064,005	30.9
Florida.....	515,428	27.2	605,258	21.8
Kentucky.....	214,202	7.5	202,876	6.9
Tennessee.....	808,035	17.5	831,468	16.1
Alabama.....	983,864	34.7	982,243	32.1
Mississippi.....	1,077,469	49.3	990,485	45.5
Arkansas.....	485,503	24.8	428,003	22.4
Louisiana.....	852,141	36.0	886,968	33.1
Oklahoma.....	232,206	9.9	200,796	9.0
Texas.....	927,279	14.5	984,963	12.8
Missouri.....	245,477	6.5	299,066	7.6

quired to support for a handful of Negro children a separate school which must be physically equal in all respects to the schools it operates for white children is, from a purely economic standpoint, obviously not receiving the most for the money it expends for the education of its children. The same money, if expended for integrated schools, would result in greater educational benefits for both white and colored children. These economic considerations alone go far to indicate the relative feasibility of integration as a practical alternative to "equalization".

2. Some Southern leaders have expressed the view that considerable popular opposition will be met in the execution of any program for integration of public schools. In their opinion, separation of the races in the public schools is one of the ways of life in the South (see the finding of the district court in No. 4, R. 620). They predict that popular antagonism to elimination of segregation in public schools, arising from a traditional hostility to the mingling of the races, will most likely be reflected in withdrawal of state aid for those schools (see, e. g., the testimony of Dr. Colgate W. Darden, R. 452, No. 4). On the other hand, the conviction has been expressed that these fears are exaggerated and unjustified, and that there is no reason to assume that, once this Court has authoritatively resolved the constitutional question, the people of the entire coun-

try, including the South, will not abide by its decision (see e. g., R. 197-198, No. 4).

We believe it would be futile and irrelevant to enter into such speculation. Recent years have witnessed, on a fairly large scale, an ever-increasing trend towards the elimination of racial segregation and discrimination in all fields and in every part of the country. In almost every instance this progress has been accomplished without disorder or friction. Traditional attitudes on racial relations are in process of constant revision, particularly in the South. As illustrative, we shall here describe (a) New Jersey's successful experience in integrating segregated public schools in the past few years and (b) the notable achievements of the Armed Forces of the United States in carrying out a program of racial integration.⁶⁷

New Jersey.—Following the adoption in 1947 of a state constitution expressly forbidding racial segregation in the public schools of the state, a program for elimination of segregated schools was put into operation. A survey disclosed that there were 43 school districts in New Jersey which had one or more separate Negro schools. These were located in urban areas, agricultural town-

⁶⁷ The materials cited in the following portion of the brief were collected by Dr. Ambrose Caliver, Assistant to the Commissioner of Education, Department of Health, Education and Welfare.

ships, and in some relatively well-to-do suburban communities. Practically all the school officials and a majority of the school board members concerned did not oppose the program of racial integration of pupils.

Since many of the communities involved had individual problems, no single formula could be applied. In a number of districts the existing small Negro schools were closed; in others new consolidated schools were built. In several communities the Negro elementary schools were converted into intermediate or junior high schools. In the larger towns and cities, school districts were rezoned and transfer regulations adopted that required all pupils to attend the schools nearest their homes.

Varying techniques were used for placing white children under colored teachers for the first time. One device used was as follows: where there were two classes of the same grade in a particular school, one class was given a white teacher, the other, a colored teacher, and a class which had a white teacher in the first grade was given a colored teacher in the second grade and a white teacher in the third grade, and so on. Many communities, however, merely placed colored teachers in the same grades in the new system that they had been teaching in the colored schools, and this appeared to work just as effectively.

Some school boards made a single formal public announcement that the schools under their jurisdiction would be integrated; in other districts public meetings were sponsored by the boards after plans for integration had been formulated and approved. In one community a plan for integration over a two-year period was adopted with the approval of Negro parents. During the first year the superintendent of schools conducted public meetings, and integration was completed by the end of that year.

One of the fears anticipated in many communities was withdrawal of pupils from the public schools and their transfer to parochial or private schools. This, however, did not eventuate. In one community where a few children were withdrawn, most of them later reentered the school. Parents who objected to having their children placed under Negro teachers were requested by school officials to give the new system a chance. Most of the protests evaporated.

The program was also successfully carried out in areas where public opposition might have been expected to present a difficult problem. For example, in Salem, which is in the southern part of the state and directly across the river from Delaware, many of the residents were raised and educated in the traditions of the South. Salem had three schools, two for white children and one for colored children. The latter constituted approximately one-third of the total enrollment.

All three schools were integrated; one of them with a colored principal in charge of five white teachers. The school superintendent reported that this was accomplished without incident or friction.

By September 1951, 40 of the 43 school districts involved in the New Jersey program were completely integrated and the remaining three districts had taken substantial steps towards integration. The state official in charge of the program summarized the New Jersey experience as follows:

While New Jersey cannot furnish any one formula, it can testify that complete integration in the public schools can and will work. It may even be safe to say once more, that the way to learn to do a thing is to do it, and in this respect, New Jersey has proven again that the best way to integrate is to do it.⁶⁸

⁶⁸ Bustard, *The New Jersey Story: The Development of Racially Integrated Public Schools*, 21 *Journ. of Negro Education* 275, 285 (1952). Other areas where public school systems have successfully been integrated include Indianapolis, Indiana, Topeka, Kansas, and Tucson, Arizona. In the District of Columbia a program of racial integration is under way in the Catholic elementary and secondary schools. The Department of Defense has recently announced that it has set the fall of 1955 as its target date for eliminating racial segregation in state-operated schools located on federal military installations. (*New York Times*, Aug. 24, 1953, p. 21.)

In the field of higher education, many Southern colleges and universities have opened their doors to Negro students. There are at least 17 public institutions of higher learning

The Armed Forces.—Racial integration on a large scale has been successfully achieved in the Armed Forces. The program for elimination of racial segregation and discrimination in the Armed Forces had its origin in Executive Order No. 9981 of July 26, 1948 (13 F. R. 4313).⁶⁹ The order established the policy "that there shall be equality of treatment and opportunity for all persons in the armed forces without regard to race, color, religion, or national origin." The President's Committee on Equality of Treatment and Opportunity in the Armed Forces, which was charged with the task of seeing that the policy was implemented effectively, found in its report of May 22, 1950, "Freedom to Serve," that

in 12 Southern states which now have Negro students. Negroes have been admitted to 38 private institutions of higher education located in the South and the District of Columbia.

⁶⁹ Executive Order 9980 of July 26, 1948, 13 F. R. 4311, declared it to be the policy of the Federal Government that all personnel actions were to be taken without discrimination on account of race, color, religion or national origin. See also 5 C. F. R. 410.1-7 (1952 Supp.) for the regulations implementing this policy. Since 1941, it has been the policy of the Federal Government that there shall be no racial discrimination in employment by Government contractors or subcontractors. See Executive Order 9346 of May 27, 1943, 8 F. R. 7183, and Executive Order 10479 of August 15, 1953, 18 F. R. 4899, for enforcement provisions. Since 1938 public parks and recreational facilities under the jurisdiction of the Department of the Interior have been operated on a non-segregation basis. This policy has been uniformly successful, and there have been no untoward incidents of racial friction.

broad programs for racial integration adopted by the Navy and the Air Force had been successfully carried out without animosity or incident. The following conclusions of the Committee are significant (Rept. 44):

Integration of the two races at work, in school, and in living quarters did not present insurmountable difficulties. As a matter of fact, integration in two of the services [the Navy and Air Force] had brought a decrease in racial friction.

The enlisted men were far more ready for integration than the officers had believed.

The attitude of command was a substantial factor in the success of the racial policies of the Air Force and the Navy.

In a recent interview, Dr. John A. Hannah, Assistant Secretary of Defense, stated that "remarkable progress" had been made in the program for ending racial segregation in the Armed Forces and that "In eight months there will be no nonintegrated units in the Army". Dr. Hannah also reported that "Universally the answer from our commanders is that it is desirable and works out very well in spite of contrary predictions," and that there had been no resistance, violence, or demonstrations. (U. S. News & World Report, October 16, 1953, pp. 46, 99.) The success of integration in the Armed Forces furnishes strong evidence of the feasibility of integration in other fields, such as public

schools, where contacts are less intimate and constant.⁷⁰

⁷⁰ Other successful experiences have been reported in such fields as industry and labor, housing, the professions, and sports. Both the American Federation of Labor and the Congress of Industrial Organizations have consistently opposed racial discriminations. In industry, racial differentiations have tended to become less significant. For an account of the successful experience of the International Harvester Company in its plants in Evansville, Louisville, and Memphis, see *Selected Studies of Negro Employment in the South: 3 Southern Plants of International Harvester Company* (National Planning Association, 1953). The techniques utilized in those plants are said to have involved "a mixture of persuasion, education, and some judiciously applied coercion." (*Id.*, p. 50.)

The Federal Housing and Home Finance Agency has reported that racial integration has been on the whole entirely satisfactory in 268 public housing projects located in the District of Columbia and in 71 other communities. See *Open Occupancy in Public Housing* (Housing and Home Finance Agency, Public Housing Administration, 1953). Since the ruling by this Court in 1948 that judicial enforcement of racial restrictive covenants is forbidden by the Constitution, *Shelley v. Kraemer*, 334 U. S. 1, there has been a growing and substantial dispersal of Negroes throughout residential areas. This has been accompanied by practically no friction or disorder. See the survey conducted by the United Press and reported in the New York Times, January 22, 1951, p. 19; "The People of Chicago," Report of the Chicago Commission on Human Relations for the 5-year period 1947-1951; Report of the Toledo Board of Community Relations, 1951; "The Transitional Housing Area", report of the Director of the Mayor's Interracial Committee in the city of Detroit (1952).

In recent years a number of Southern law schools and medical colleges have relaxed their restrictions against the admission of Negroes. In 1950 the American Medical Association adopted a resolution, reaffirmed in 1952, declaring its

B. *The decrees.* On the basis of the foregoing, the considerations which appear to be relevant to the framing of the decrees in the present cases may briefly be summarized as follows:

1. The constitutional right involved in these cases is "personal and present." The plaintiffs can forcefully argue that the only remedy adequate to redress the existing, continuing violation of their constitutional rights is to direct their admission to nonsegregated schools now and not at some future date when such relief would come, at least for some of them, too late to have any benefits. In the absence of compelling reasons to the contrary, vindication of constitutional rights should be as prompt and effective as is possible in the circumstances.

2. On the other hand, the effects of a decision holding school segregation to be unconstitutional would not be limited to the areas and parties involved in the cases at bar. Such a decision would have national significance and consequences. As a binding precedent, the Court's decision would entail revision of school laws and procedures in

policy to be against racial qualifications in the admission of physicians to its constituent societies. At the present time Negro doctors have been admitted to 27 constituent societies, located in southern and border states, which had formerly barred Negroes.

The field of professional sports evidences a striking change in racial attitudes. Negroes are now common in the ranks of the professional baseball and football teams. See, generally, *The Integration of the Negro into American Society* (Howard University Press, 1951).

at least seventeen states and the District of Columbia. Administrative and other obstacles will have to be overcome in order to accomplish complete transition to nonsegregated systems. The nature and extent of such problems will vary throughout the country, and the time required for eliminating school segregation in any particular community will depend on numerous factors which neither this Court nor counsel can now evaluate. Regardless whether this Court should direct that school integration be carried out "forthwith" or "gradually", a brief period of time should be allowed for making necessary administrative adjustments.

3. In some places (such as the District of Columbia, Kansas and Delaware) change-over to a nonsegregated system should be a relatively simple matter, requiring perhaps only a few months to accomplish. In such areas, where there are no serious administrative or other impediments to integration, there can plainly be no valid justification for delay in ending exclusion of colored children from schools which they would otherwise be entitled to attend. In other areas, a longer period of time may be needed, depending on local conditions.

4. Despite a decision by this Court that racial segregation in public schools is unconstitutional, there will still remain many areas in which, as a practical matter, the schools will be attended by

at least a preponderance of children of one color. This could arise from purely geographical factors, even though there is full compliance with the letter and spirit of the decision. There are numerous communities characterized by exclusively Negro or white occupancy of particular residential sections. Even under normal school districting drawn on a wholly geographical and nonracial basis, the pupils of a public school in a district reflect the racial composition of its population. It may reasonably be assumed that this factor alone will have considerable effect in many areas in reducing the extent of the adjustments required by a decision prohibiting racial segregation in public schools.

5. There is no single formula or blueprint which can be uniformly applied in all areas where existing school segregation must be ended. Local conditions vary, and what would be effective and practicable in the District of Columbia, for example, could be inappropriate in Clarendon County, South Carolina. Only a pragmatic approach based on a knowledge of local conditions and problems can determine what is best in a particular place. For this reason, the court of first instance in such area should be charged with the responsibility for supervision of a program for carrying out the Court's decision. This Court should not, either itself or through appointment of a special master, undertake to formulate specific and detailed programs of implementation

adapted to the special needs of particular cases.

6. The burden of (a) showing that, in the particular circumstances, a decree requiring the immediate admission of the plaintiffs to nonsegregated schools would be impracticable or inequitable, and, in that event, of (b) proposing, for the court's approval, an effective program for accomplishing transition to a nonsegregated system as soon as practicable, should rest on the defendants. As the responsible authorities in charge of the public schools, they would be in the best position to develop a program most suited to local conditions and needs, and to indicate the length of time required to put it into effect. In passing upon such a program, the lower court could receive the views not only of the parties but of interested persons and groups in the community. Such a locally-developed program for orderly and progressive transition to nonsegregation would tend to encounter less resistance and thus be more likely to achieve success.

As has previously been noted (pp. 160-162, *supra*), the decree entered by this Court in *United States v. American Tobacco Co.*, 221 U. S. 106, furnishes a useful precedent and guide to the disposition of the present cases. Adapting the provisions of that decree to the circumstances here involved, the Government respectfully suggests to the Court that, if it holds school segregation to be unconstitutional, the public interest would be

served by entering decrees in the instant cases providing in substance as follows:

(1) That racial segregation in public schools be decreed by this Court to be a violation of rights secured by the Constitution;

(2) That each case be remanded to the appropriate court of first instance for such further proceedings and orders as are necessary and proper to carry out the Court's decision;

(3) That the lower courts be directed on remand to enter decrees under which the defendants shall forthwith be enjoined from using race or color as a basis for determining admission of children to public schools under their authority or control; provided, however, that if the defendants show that it is impracticable or inequitable to grant the plaintiffs the remedy of immediate (i. e., at the beginning of the next school term) admission to nonsegregated schools, the court shall order the defendants to propose and, on approval by the court after a public hearing, to put into effective operation a program for transition to a nonsegregated school system as expeditiously as the circumstances permit;

(4) That for the accomplishment of these purposes, taking into view the difficulties which may be encountered, a period of one year be allowed from the receipt of this Court's mandate, with leave, however, in the event, in the judgment of the lower court, the necessities of the situa-

tion so require, to extend such period for a further reasonable time; and that, in the event before the expiration of the period thus fixed, a condition in harmony with the requirements of the Constitution is not brought about, it shall be the duty of the lower court to enter appropriate orders, by way of injunction or otherwise, directing immediate admission of the plaintiffs to nonsegregated schools; and

(5) That this Court retain jurisdiction for the purpose of making such further orders and decrees, if any, as may become necessary for carrying out its mandate.

CONCLUSION

In response to the questions stated in the Court's order directing reargument of these cases, the United States respectfully submits (1) that the primary and pervasive purpose of the Fourteenth Amendment, as is shown by its history and as has repeatedly been declared by this Court, was to secure for Negroes full and complete equality before the law and to abolish all legal distinctions based on race or color; (2) that the legislative history of the Amendment in Congress is not conclusive; (3) that the available materials relating to the ratification proceedings in the various state legislatures are too scanty and incomplete, and the specific references to school segregation too few and scattered, to justify any definite conclusion as to the existence of a general understanding in such legislatures as to the effect

which the Amendment would have on school segregation; (4) that it is within the judicial power to direct such relief as will be effective and just in eliminating existing segregated school systems; and (5) that if the Court holds that laws providing for separate public schools for white and colored children are unconstitutional, it should remand the instant cases to the lower courts with directions to carry out the Court's decision as expeditiously as the particular circumstances permit, as indicated *supra*.

Respectfully submitted.

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APPENDIX

I. THE FEDERAL MATERIALS

A. THE THIRTEENTH AMENDMENT

The Thirteenth Amendment originated in S. J. Res. 16, introduced by Senator Henderson of Missouri on January 11, 1864.¹ It was referred to the Judiciary Committee, of which Senator Lyman Trumbull of Illinois was chairman (*Globe*, 38th Cong., 1st Sess., p. 145).² The resolution was reported by Trumbull on February 10, 1864

¹ The text of the resolution was as follows:

ART. 1. Slavery or involuntary servitude except as a punishment for crime, shall not exist in the United States.

ART. 2. The Congress, whenever a majority of the members elected to each House shall deem it necessary, may propose amendments to the Constitution, or, on the application of the Legislatures of a majority of the several States, shall call a convention for proposing amendments, which in either case shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the Legislatures of two thirds of the several States, or by conventions in two thirds thereof, as the one or the other mode of ratification may be proposed by Congress (*Globe*, 38th Cong., 1st Sess., p. 1313).

²All references to the Congressional Globe in this section, until otherwise noted, are to the 38th Congress, 1st Session.

(Globe, p. 553), in an amended form.³ Consideration was postponed until March 28, 1864. At that time Senator Trumbull opened the debate, stating that the measure was intended to remove from the Constitution the inconsistency of the founding fathers in proclaiming the equal rights of all persons to life, liberty and happiness, while denying these rights to a whole race. This was to be accomplished by a constitutional provision abolishing the institution of slavery and all its incidents (Globe, p. 1313). Senator Wilson of Massachusetts described the incidents of slavery which would be removed:

If this amendment shall be incorporated by the will of the nation into the Constitution of the United States, it will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading and bloody codes; its dark, malignant, barbarizing spirit * * *

³ The amended form, which was the one finally adopted, read as follows:

(Two thirds of both Houses concurring,) That the following article be proposed to the Legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three fourths of said Legislatures, shall be valid, to all intents and purposes, as a part of the said Constitution, namely:

ARTICLE XIII

SEC. 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation (Globe, p. 1313).

* * * Then the slave mart, pen, and auction-block, with their clanking fetters for human limbs, will disappear from the land they have brutalized, and the school-house will rise to enlighten the darkened intellect of a race imbruted by long years of enforced ignorance. Then the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom. * * * Then the wronged victim of the slave system, the poor white man, the sand-hiller, the clay-eater of the wasted fields of Carolina, impoverished, debased, dishonored by the system that makes toil a badge of disgrace, and the instruction of the brain and soul of man a crime, will lift his abashed forehead to the skies and begin to run the race of improvement, progress, and elevation. Globe, p. 1324.)

On March 30, 1864, the debate continued. Senator Davis of Kentucky, speaking against the amendment, argued that slavery had not caused the war, and that its abolition by federal action would be a serious violation of state sovereignty, and would have a "potency * * * for large and permanent mischief" (Globe, Appendix, pp. 104, 108). On the following day, March 31, he offered an amendment that no Negro could ever hold citizenship or public office in the United States. This was defeated overwhelmingly by a vote of 28 to 6. (Globe, p. 1370.) On that day, Senators Saulsbury of Delaware and Clark of New Hampshire engaged in an extended debate over the constitutional authority of Congress to propose an amend-

ment at a time when several of the states were out of the Union. (Globe, pp. 1364-1370.)

On April 4, Senator Howe of Wisconsin spoke in favor of the joint resolution. (Globe, Appendix, p. 111.) He pointed to the many degrading economic, moral and intellectual effects of the slave system. His speech concluded:

I think your amendment should go further than as I understand it does. I think that when the American people command that these persons shall be free, they should command that they be educated, or at least that there be no laws enacted in any State to prevent their education * * * the state which enfranchises its people and does not educate them shall be doubly damned. * * *. (Globe, Appendix, p. 118.)

On April 5, 1864, Senator Reverdy Johnson of Maryland declared that the proposed amendment was proper and necessary. "The only practical mischief of the measure is the condition of the slaves. They are uneducated." (Globe, p. 1424.) That ignorance, he asserted, was deliberate, for education would have meant revolt against the "wicked" institution of slavery. (*Ibid.*). On the same day, Senators Davis and Powell of Kentucky each offered amendments imposing conditions upon the emancipation of the slaves. All these amendments were defeated. (Globe, pp. 1424-1425.)

Senator Harlan of Iowa reviewed the incidents of slavery in a speech on April 6, 1864. (Globe, p. 1437.) He pointed out that slavery necessarily resulted in the abolition of the relation between husband and wife and parent and child; it precluded the relation of person to property, because

a slave was declared incapable of acquiring and holding property; it deprived slaves of status in court, and of the right to testify. Nor were the effects of slavery harmful only to the slaves:

And then another incident of this institution is the suppression of the freedom of speech and of the press, not only among these down-trodden people themselves but among the white race. Slavery cannot exist where its merits can be freely discussed; hence in the slave States it becomes a crime to discuss its claims for protection or the wisdom of its continuance. Its continuance also requires the perpetuity of the ignorance of its victims. It is therefore made a felony to teach slaves to read and write.

It also precludes the practical possibility of maintaining schools for the education of those of the white race who have not the means to provide for their own mental culture. It consequently degrades the white as well as African race. (Globe, p. 1439.)

Senator Saulsbury rose to rebut Harlan. Quoting Biblical authorities, he stated that slavery had existed almost since the flood, and was a fact of nature:

The theory now common seems to be that the law of God's providence is equality and uniformity. Such a law never did pervade or regulate the works of God's providence to man; but the law of His providence is inequality and diversity. I treat of this inequality of races, of human beings, precisely as I treat of the inequality which I see in inanimate and physical nature all around me. (Globe, p. 1442.)

Senator Saulsbury concluded, therefore, that the Congress should leave the institution of slavery as it was, and not tamper with the will of God. (*Ibid.*) However, after some further debate, the Committee of the Whole agreed to the Judiciary Committee amendment. (Globe, p. 1447.)

On April 7, 1864, Senator Hendricks of Indiana echoed Saulsbury's views of the natural inferiority of the Negro race. No constitutional amendment could change that, for

* * * they will never associate with the white people of this country upon terms of equality. It may be preached; it may be legislated for; it may be prayed for; but there is that difference between the two races that renders it impossible. If they are among us as a free people, they are among us as an inferior people. (Globe, p. 1457.)

Then Senator Henderson, author of the resolution, spoke for its passage. It must be done, he said, to save the Union. He also said:

I will not be intimidated by the fears of negro equality. The negro may possess mental qualities entitling him to a position beyond our present belief. If so, I shall put no obstacle in the way of his elevation. * * * Whether he shall be a citizen of any one of the States is a question for that State to determine. If New York or Massachusetts or Louisiana shall confer on him the elective franchise, it is a matter of policy with which I have nothing to do. The qualifications of voters for members of Congress is a question under the exclusive control of the respective States. * * * So in passing this amendment we do not confer

upon the negro the right to vote. We give him no right except his freedom, and leave the rest to the States. (Globe, p. 1465.)

On April 8, 1864, the last day of the Senate debate, Senator Charles Sumner took the floor to speak in favor of the Constitutional amendment. It would give completeness and permanence to emancipation, and bring the Constitution into avowed harmony with the Declaration of Independence. However, he preferred that it be phrased differently. He offered the following substitute:

All persons are equal before the law, so that no person can hold another as a slave; and the Congress may make all laws necessary and proper to carry this article into effect everywhere within the United States and the jurisdiction thereof. (Globe, p. 1843).⁴

Sumner disclaimed any intention of changing the effect of the original resolution; he only wished to express its purpose more forcefully, by explicitly stating the doctrine of equality before the law. He believed that that expression gave precision to the principle of protecting human rights enunciated in the Declaration of Independence. Acknowledging that the language was new in this country, he pointed out that it was already well known in France, and all of Europe, as an overriding principle of human rights. (*Ibid.*)

⁴ This amendment in the nature of a substitute was originally offered on February 17, 1864, but had not been discussed prior to this time. (Globe, p. 694.) Sumner had also offered a joint resolution (S. J. Res. 24) on February 8, 1864 (Globe, p. 521), to the same effect.

However, when Senator Trumbull insisted on the Committee version, Sumner withdrew his amendment. Remarking on this decision, Senator Howard of Michigan stated that the Committee version was derived from the "revered" Jeffersonian Ordinance of 1787, whereas Sumner's amendment was of foreign origin. (Globe, p. 1489.) To Senator Howard, the "equality" language might mean that

A wife would be equal to her husband and as free as her husband before the law. (Globe, p. 1488.)

Senators Davis, Saulsbury and McDougall of California delivered final speeches against the resolution. Saulsbury offered a lengthy substitute amendment, but it was rejected. The final vote was then taken, resulting in passage of the resolution by a vote of 38 to 6. (Globe, p. 1490.)

In the House, the proceedings were more extended. When the resolution was taken up on May 31, 1864, an immediate motion by Representative Holman of Indiana for rejection was defeated by a vote of 76 to 55. (Globe, p. 2612.) Representative Morris of New York then opened the debate, citing the evils of slavery which had led the country away from the principles of equality embodied in the Declaration of Independence. In his opinion, the amendment was necessary to conform the Constitution to those principles. (Globe, p. 2613.) At an evening session that day, Representative Herrick, also from New York, attacked the amendment as a tampering with the Constitution of the fathers which would promote "eternal disunion." (Globe, p. 2615.) Furthermore,

it would abolish "the right of the States to control their domestic affairs, and to fix each for itself the status, not only of the negro, but of all other people who dwell within their borders." (Globe, p. 2616.) After a speech by another New Yorker, Representative Kellogg, which is of no significance here, the House adjourned. (Globe, p. 2621.)

After a series of postponements caused by the absence of the many members attending the Republican (Union) presidential convention, which had opened on June 7th, the House resumed consideration of the proposed amendment on June 14, 1864. Representative Pruyn, Wood and Kalbfleisch, all of New York, argued that the amendment was an invasion of the reserved rights of the States. (Globe, pp. 2939, 2940, 2945.) On the other side, Representative Higby of California denied that there was no power under the Constitution to amend it in this respect. (Globe, p. 2943.)

In an evening session that day, Mr. Wheeler of Wisconsin offered a proviso to the amendment, that emancipation should not take place in the loyal border states until ten years after ratification. (Globe, Appendix, p. 124.)⁵ Representative Shannon of California declared that slavery was inconsistent with the spirit of the institutions of the nation. Not only the slave, but also the non-slaveholding class of white men was harmed by its evils. He noted that

⁵ On June 15, 1864, just before the final vote was taken on the resolution, Wheeler's amendment was defeated. (Globe, p. 2995.)

This institution necessarily establishes three conditions of society where it prevails: the master, the slave, and that most degraded condition of all, the middle-man, or the poor white trash, whose vocation is pander and pimp to the vices of both master and slave, and ultimately dependent on both, having no recognized condition, and enjoying none of the privileges of the governing or governed class, but an outcast from both and despised by both.

Now let it never be forgotten that our mission also is to elevate and disenthral that most injured and dependent class of our fellow white men from their downtrodden and degraded condition, that they too may be men, and enjoy the independence and rights of manhood. (Globe, p. 2948.)

Mr. Shannon concluded with an argument against Wheeler's proviso, insisting that Congress "must not only emancipate the slaves in the seceded States, but we must include the slaves of the border States, leaving no root of the accursed tree to spring up for the future to the peril of the country." (Globe, p. 2949.)

Mr. Marcy of New Hampshire, speaking against emancipation, stated that the resolution was an attempt to overthrow the Constitution, and declared that his constituents did not believe "the black man is equal to the white." (Globe, p. 2950.) However, the "conservative party" will win the impending election and "the Government instituted for white men will again become popular." (Globe, p. 2951.)

Representative Kellogg of Michigan believed that the words "all men are created equal" in the Declaration of Independence were implicit in the

Constitution, and that the proposed amendment merely carried out their purpose. (Globe, p. 2954.)

Representative Ross of Illinois indicated his belief that the amendment was part of the administration's policy to "place the negro as to civil and political rights on an equality with the whites * * *" (Globe, p. 2957.) This was the "negro-equality doctrine tendered by the party in power." (Globe, p. 2959.) Mr. Holman of Indiana was also against freeing the Negro, characterizing the amendment as an invasion of "the domestic policies of States so solemnly guaranteed by the Constitution." (Globe, p. 2961.) He presented his interpretation of its scope:

It confers on Congress the power to invade any State to enforce the freedom of the African in war or peace. What is the meaning of all that? Is freedom the simple exemption from personal servitude? No, sir; in the language of America it means the right to participate in government, the freedom for which our fathers resisted the British empire. Mere exemption from servitude is a miserable idea of freedom. A pariah in the State, a subject, but not a citizen, holding any right at the will of the governing power. What is this but slavery? It exists in my own noble state. (Globe, p. 2962.)

On June 15, 1864, the last day of House debate on the amendment, Representative Farnsworth of Illinois deprecated the opposition fears of Negro equality and miscegenation. (Globe, p. 2979.) Mr. Mallory of Kentucky asserted that

passage of the amendment would lead the states to abject submission and slavery:

Give up our right to have slavery if we choose, submit to have that right wrested from us, and in what right are we secure? One after another will be usurped by the President and Congress, until all State rights will be gone, and perhaps State limits obliterated, and a grand imperial despotism erected on the ruins of our rights and liberties. (Globe, p. 2981.)

Mr. Edgerton of Indiana charged that the object, in part, of the party in power was, by means of this proposed amendment, to make the Negro population of the South an active basis for representation in the Federal Government. He declared:

First, the negro a citizen of the United States; secondly, the negro a free citizen of the United States, protected everywhere, in defiance of existing State constitutions and laws, as such citizen; and thirdly, the negro a voting citizen of the United States, are all propositions logically involved in the proposed amendment. (Globe, p. 2987.)

His speech concluded with this accusation against the majority in Congress:

You desire no peace, and you do not intend, if you can help it, to accept peace until you have abolished slavery; deprived if not robbed by confiscation the property-holders of the South of their rightful inheritance; made negroes socially and politically the equal of white men; and remodeled the Constitution to suit your own political purposes. (Globe, p. 2988.)

Representative Ingersoll of Illinois, who was in favor of the amendment, gave some idea of his definition of freedom:

I believe that the black man has certain inalienable rights, which are as sacred in the sight of Heaven as those of any other race. He has the right to live and live in a state of freedom. He has a right to breathe the free air and enjoy God's free sunshine. He has a right to till the soil, to earn his bread by the sweat of his brow, and enjoy the rewards of his own labor. (Globe, p. 2990.)

However, in his view, freedom, in a broad sense, would not be given to the slave alone:

I am in favor of the adoption of this amendment to the Constitution for the sake of the seven millions of poor white people who live in the slave States but who have ever been deprived of the blessings of manhood by reason of this thrice-accursed institution of slavery. Slavery has kept them in ignorance, in poverty, and in degradation. Abolish slavery, and school-houses will rise upon the ruins of the slave mart, intelligence will take the place of ignorance, wealth of poverty, and honor of degradation * * * (*Ibid.*).

A vote was taken on June 15, 1864: yeas 93, nays 65, not voting 23. Since the required two-thirds majority had not been obtained, the resolution failed. However, Congressman Ashley of Ohio, originally voting in favor of the Amendment, changed his vote for the declared purpose of enabling him, under the rules, to bring on a motion to reconsider. (Globe, p. 2995.) No

further action was taken at that session of the House.

In the second session of the 38th Congress, the "lame duck" session, President Lincoln's message on the state of the Union referred to the victory of the Republican party at the polls on the antislavery issue. He recommended the reconsideration and passage of the resolution at that session, pointing out that the next Congress would almost certainly pass the measure if this one did not. (Globe, 38th Cong., 2d Session, App., p. 3.)

Representative Ashley, the floor leader for the measure in the House, opened the discussion on reconsideration on January 6, 1865, again urging that the resolution be passed, and reiterating the harmful effects of slavery upon the non-slaveholding population of the South. (Globe, 38th Cong., 2d Sess., p. 138).^{*} Representative Orth of Indiana declared that an amendment prohibiting slavery in the United States would effect a practical application of the self-evident truths embodied in the Declaration of Independence. (Globe, p. 142.)

Representative Bliss of Ohio, in his speech on January 7, 1865, continued his opposition. Even the Negro had sense enough to know, he said,

* * * that politicians cannot reverse the decree of Almighty God and make their race equal, socially or politically, with white men. (Globe, p. 150.)

^{*}The remaining references to the Congressional Globe in this section are to the 38th Congress, 2d Session.

Mr. Rogers of New Jersey denied the assertion that the amendment would have the effect of conforming our institutions to the principles of the Declaration of Independence. In his view, the Declaration had nothing to do with the slaves, for "neither the persons who had been imported as slaves nor their descendants, whether they had then become free or not, were then included in the general words of the Declaration of Independence or acknowledged as a part of the people. They had for more than a century before been regarded as an inferior race and not fit to associate with whites, socially or politically * * *"

(Globe, p. 152.)

Mr. Davis of New York then rose to observe that the definition of civil liberty, as indicated in Mr. Rogers' speech, apparently consisted in the right of one people to enslave another people to whom nature had given equal rights of freedom. He declared that such was not his own interpretation:

Nature made all men free, and entitled them to equal rights before the law; and this Government of ours must stand upon this principle, which, sooner or later, will be recognized throughout the civilized world. (Globe, p. 154.)

His speech concluded with the plea that

when we speak of civil liberty let it not be that which represents only the blood of a particular race; let it be that which represents man, no matter what land may have given him birth, no matter what may have been his political condition.

I am not, sir, one of those who believe that the emancipation of the black race is of itself to elevate them to an equality with the white race. I believe in the distinction of races as existing in the providence of God for his wise and beneficent designs to man; but I would make every race free and equal before the law, permitting to each the elevation to which its own capacity and culture should entitle it * * *. (Globe, p. 155.)

On January 9, 1865, consideration was resumed. Congressman Yeaman of Kentucky, Morrill of Vermont and Odell of New York all spoke in favor of the Amendment. (Globe, pp. 168, 172, 174.) On the other hand, Mr. Ward of New York remained against it; he observed that

* * * we are now called upon to sanction a joint resolution to amend the Constitution so that all persons shall be equal under the law, without regard to color, and so that no person shall hereafter be held in bondage * * *

Sir, it would seem to me that the sum total of the wisdom of the ruling party is contained in the dogma that the negro is exactly like the white man. (Globe, p. 177.)

Nor could Representative Mallory of Kentucky assent to such a proposition, because he foresaw its result would be to give to the Negro "an equality with the white man, socially, civilly, politically." (Globe, p. 179.) He also feared that section 2, giving Congress enforcement powers, would be used to require enfranchisement of the Negro. (Globe, p. 180.)

On the following day, January 10, 1865, after remarks by various members, which repeated previous arguments (Globe, pp. 189, 193, 195, 199, 200), Congressman McBride of Oregon undertook to rebut the argument that emancipation meant enfranchisement:

A recognition of natural rights is one thing, a grant of political franchises is quite another. * * * If political rights must necessarily follow the possession of personal liberty, then all but male citizens in our country are slaves. This illustration alone reduces the conclusion to an absurdity. Sir, let the rights and status of the negro settle themselves as they will and must upon their own just basis. If, as a race, they shall prove themselves worthy the elective franchise, I tell gentlemen they will enjoy the right; they will demand and they will win it, and they ought to have it. If, on the contrary, as a race, they are so far inferior to those with whom they must compete as to be unequal to the high and responsible position of free electors, any attempt to elevate them to that standard will be a signal failure. I have no faith in their ability to contend in the race before them successfully, and no fear of degrading my own race by contact with them. for, sir, there is an antagonism between the races which will prevent anything like a complete blending of them, and I leave all questions of the consequences of emancipation to be settled by justice and expediency as experience shall dictate. (Globe, p. 202.)

On January 13, 1865,⁷ Mr. Rollins of Missouri, who had voted against the measure in the spring, now changed his vote, stating:

I am a believer in the Declaration of Independence wherein it is asserted that "all men are created equal." I believe that when it says "*all men*" it means every man * * * without regard to race, color, or any other accidental circumstances by which he may be surrounded. (Globe, p. 260.)

After additional speeches in favor of the Amendment by Representatives Garfield of Ohio, Stevens of Pennsylvania⁸ and Baldwin of Massachusetts (Globe, pp. 263, 265, 266), the House adjourned for the day.

Consideration of the resolution was postponed, and not resumed until January 28, 1865. On that day, the debate consisted of a number of short addresses which added little to the discussion. (Globe, pp. 478, 480, 481, 482, 485, 487.) However, in the course of one speech, Representative Patterson of New Hampshire indicated that all

⁷ On January 12, 1865, Representatives Smith of Kentucky, Cox of Ohio, Woodbridge of Vermont, and Thayer of Pennsylvania debated the question of state rights. (Globe, pp. 235-246.) However, the discussion is not particularly relevant.

⁸ This was the speech in which Thaddeus Stevens declared what he hoped would be his epitaph after his death:

Here lies one who never rose to any eminence, and who only courted the low ambition to have it said that he had striven to ameliorate the condition of the poor, the lowly, the downtrodden of every race and language and color. (Globe, p. 266.)

the previous remarks about "negro equality" were irrelevant to the discussion of the resolution. He pointed out that

In seeking to purge our institutions of the mortal taint of slavery, in seeking to rescue our liberties by an organic change from the fatal *imperium in imperio*, it is not necessary to fix the ethnological position of the African or to prove his equality with the white races. (Globe, p. 484.)

When debate opened on January 31, 1865, the day on which the final vote was to be taken, Representatives McAllister and Coffroth of Pennsylvania, and Herrick of New York, who had all voted against the resolution in the first session, rose to announce that they had changed their minds and would now support the proposed amendment. (Globe, pp. 523, 524.) Congressman Brown of Wisconsin, however, remained opposed, on the ground, *inter alia*, that immediate emancipation

* * * utterly ignores the greatest evil of slavery; [which] extends through generations its effect in completely debasing the subject of it and making him unfit either to be a good citizen or a good man. (Globe, p. 527.)

After Mr. Ashley's pending motion to reconsider had been agreed to, the final vote was taken on the resolution. It passed by a vote of 119 to 56, slightly more than the required two-thirds, and the House immediately adjourned, "in honor of this immortal and sublime event." (Globe, p. 531.)

B. THE FREEDMEN'S BUREAU BILL

The first bill to enlarge the powers of the Freedmen's Bureau (S. 60, 39th Cong., 1st Sess.)⁹ originated, in part, from an earlier bill introduced by Senator Henry Wilson to maintain the freedom of the inhabitants in the rebel-ling states (S. 9), and, in part, on the basis of a report by Major General Carl Schurz on conditions in the South (S. Ex. Doc. No. 2).

1. *The Wilson bill (S. 9)*

On December 4, 1865, the opening day of the first session of the 39th Congress, Senator Wilson of Massachusetts introduced in the Senate a bill (S. 9) providing for the nullification of all laws of the Southern States which recognized, authorized, or maintained any inequality of civil rights or immunities because of color, race or previous servitude. (Globe, pp. 2, 39.) On December 13, he moved to take up the bill without committee reference. In urging immediate adoption of his measure, Wilson noted that "whatever differences of opinion may exist in regard to the right of suffrage, I am sure there can be no difference of opinion among honest and just men in regard to maintaining the civil rights and immunities of these freedmen; they should stand at any rate like the non-voting white population of those States." (Globe, p. 39.) Wilson added that not only did the "old slave codes still exist," in many of the Southern States, but that "four or five of those States are passing other codes inhuman, un-

⁹ All references to bill numbers, executive documents and the Congressional Globe in this section are to the 39th Congress, 1st Session.

christian, and inconsistent with the idea that these freedmen have rights." (Globe, p. 41.)

Senator Johnson of Maryland, although in favor of the general proposition, thought that the bill raised several serious questions. He believed, therefore, that it should be referred to committee for further study. (Globe, p. 40.) Senator Cowan of Pennsylvania expressed himself as "exceedingly desirous that by some means or other the natural rights of all people in the country shall be secured to them, no matter what their color or complexion may be, and may be secured to them in such a way as that States themselves cannot hereafter wrest them away from them." (Globe, p. 40.) However, he thought that this aim could only be attained by means of an amendment to the Constitution. (Globe, p. 41.) Senator Wilson rose to state his understanding that the Thirteenth Amendment had already been adopted,¹⁰ and that under its second section, "we have the power to pass not only a bill that shall apply these provisions to the rebel States, but to Kentucky, to Maryland, to Delaware, and to all the loyal States." (Globe, p. 41.)

Senator Sherman of Ohio felt that the measure ought to be postponed until the amendment was finally ratified. There would then be no doubt of the power of Congress to pass the bill, and to make it definite and general in its terms, and applicable throughout the United States. However, he objected that the bill did not specify

¹⁰ This statement was made on December 13, 1865. The Thirteenth Amendment was actually declared to have been adopted on December 18, 1865, by a proclamation of the Secretary of State, 13 Stat. 774.

what rights were to be protected. He wished it to be more specific, for there was "scarcely a State in the Union that does not make distinctions on account of color." (Globe, p. 41.) He preferred that

when we legislate on this subject we should secure to the freedmen of the southern States certain rights, naming them, defining precisely that they should be. For instance, we could agree that every man should have the right to sue and be sued in any court of justice * * *. So with the right to testify, * * * the right to acquire and hold property, to enjoy the fruits of their own labor, to be protected in their homes and family, the right to be educated, and to go and come at pleasure. These are among the natural rights of free men." (Globe, p. 42.)

Senator Saulsbury of Delaware indicated his doubts that the proposals just mentioned were authorized, or even necessary. He believed that such measures could not be authorized under the second section of the Thirteenth Amendment. (Globe, p. 43.) On the other hand, Senator Trumbull of Illinois declared that that section was inserted for the very purpose "of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free." (Globe, p. 43.) He thought it was idle to say that a man was free who could not go and come at pleasure, who could not buy and sell property, and who could not enforce his rights. Trumbull then gave notice of his intention to introduce a bill that would secure to the former slaves every one of those rights. (*Ibid.*)

On December 20, 1865, Senator Sumner of

Massachusetts declared that the bill "proposes nothing less than to establish Equality before the Law, at least so far as civil rights are concerned, in the rebel States." (Globe, p. 91.) He referred to the emancipation of serfs in Russia as a model for imitation, cataloging the rights there granted—the rights of family, contract, and property; equality in the courts; and equality in political rights. He continued:

By still another section the freedman is secured *Equality at schools and in Education*; thus:

"He may place his children in the establishments for public education, to embrace the career of instruction, or the scientific career, or to take service in the corps of surveyors."

Surely here again is an example for us. (Globe, p. 91.)

On the following day, December 21, 1865, Senator Stewart of Nevada opened the debate. He was against the bill, as being too radical a measure. (Globe, p. 109.) However, he avowed that he was "in favor of legislation on this subject, and such legislation as shall secure the freedom of those who were formerly slaves, and their equality before the law * * *." But, he maintained, these rights could be fully secured without holding the Southern states in subjugation. (Globe, p. 111.)

Senator Wilson rose to declare, on behalf of his bill, that the Black Codes must be annulled, so that the

man made free by the Constitution of the United States, sanctioned by the voice of the American people, is a freeman indeed; that

he can go where the pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights and guarantees of the good old common law are his, and that he walks the earth, proud and erect in the conscious dignity of a free man * * *. (Globe, p. 111.)

The policy of emancipation "that carries with it equality of civil rights and immunities" was, he said, preferable to "that other policy that makes the enfranchised bondman a serf or peon, the slave of society, its soulless laws and customs." (*Ibid.*) However, he noted that the bill would be postponed over the Christmas recess. Possibly, he said, it would not be acted upon at all, now that the constitutional amendment had been declared adopted. After the holidays, the Congress would "probably enter on the discussion of the broader question of annulling all the black laws in the country and putting these people under the protection of humane, equal, and just laws." (*Ibid.*) After the adjournment on this day, the bill was not brought up again.

2. *The Schurz Report*

On December 12, 1865, during the consideration of the Wilson bill, the Senate passed a resolution requesting the President to submit "information of the state of that portion of the Union lately in rebellion," the information to include the report to the President made by Major General Carl Schurz, which was based on a lengthy tour of the South. (Globe, p. 30.) The requested informa-

tion was submitted by the President, and ordered printed, on December 19, 1865. (Globe, pp. 78-80.)

The data was prefaced by a brief message from the President to the effect that the Southern states were civilly tranquil, local government was being quickly restored, and effective measures were being taken by those states "to confer upon freedmen rights and privileges which are essential to their comfort, protection and security." (S. Ex. Doc. No. 2, p. 1.) The Schurz report, however, indicated that the Southern states were not tranquil, and that Union soldiers, people from the North, and loyal Unionists in those states went abroad at peril of their lives. (*Id.*, pp. 7, 8.) The measures taken by the Southern states relating to the freedmen were not to be mistaken for real measures of protection, for

ordinances abolishing slavery passed by the conventions under the pressure of circumstances, will not be looked upon as barring the establishment of a new form of servitude. (*Id.*, p. 45.)

Although the emancipation of the slaves would be submitted to so long as no alternative was possible, the freedman was

considered the slave of society, and all independent State legislation will share the tendency to make him such. (*Ibid.*)

Since the war had come from the conflicts over slavery and the status of the Negro, the position of the Negro was to be considered as an integral part of any plan of reconstruction. (*Id.*, p. 15.) Special consideration had to be given to the need for educating the freedman, to be promoted as an

integral part of the educational systems of the states. (*Id.*, p. 25.) This would be a difficult task, for the prevailing temper of the South would not allow even rudimentary education of the Negro, since it would spoil him for work. (*Ibid.*) Schoolhouses were being burned in unsettled areas; and even in more stabilized areas of the South the white population was unwilling to permit use of tax funds for colored schools, even though the colored population contributed to the tax. (*Id.*, p. 26.)

3. *The Freedmen's Bureau bill* (S. 60)

The first "reconstruction" action following the submission of the Schurz report was consideration of the bill to extend the Freedmen's Bureau (S. 60). Senator Trumbull, its sponsor, reported it from the Judiciary Committee, of which he was chairman, on January 12, 1866. (*Globe*, p. 209.) The bill provided for the broadening of the administrative establishment and powers of the Freedmen's Bureau, created by the preceding Congress. Act of March 3, 1865, 13 Stat. 507. The measure contained an express provision requiring the President to extend protection through the Freedmen's Bureau whenever it appeared that any of the civil rights or immunities of white persons were being refused or denied to freedmen on the basis of color. (*Globe*, p. 209.)¹¹

¹¹ The provision read as follows:

SEC. 7. Whenever, in any State or district in which the ordinary course of judicial proceedings has been interrupted by the rebellion, and wherein, in consequence of any State or local law, ordinance, police, or other regulation, custom, or prejudice, any of the civil rights or immunities belonging to white persons, including the

After certain committee amendments were agreed to, none of which is of importance here, a date was set for debate on the bill.

On January 18, 1866, consideration of the measure began. Senator Stewart of Nevada remarked that

* * * here is a practical measure before the Senate for the benefit of the freedman, carrying out the constitutional provision to protect him in his civil rights. I am in favor of this bill. It goes to the utmost extent that I think we are entitled to go under the constitutional amendment. There is another bill introduced by the Senator from Illinois which must go along with it, which

right to make and enforce contracts, to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate, are refused or denied to negroes, mulattoes, freedmen, refugees, or any other persons, on account of race, color, or any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, or wherein they or any of them are subjected to any other or different punishment, pains, or penalties, for the commission of any act or offense than are prescribed for white persons committing like acts or offenses, it shall be the duty of the President of the United States, through the Commissioner, to extend military protection and jurisdiction over all cases affecting such persons so discriminated against. (Globe, p. 318.)

The following section provided criminal penalties for anyone depriving such a person of these civil rights. It also declared that the jurisdiction of the Freedmen's Bureau should cease in a Southern state after it "shall have been fully restored in all its constitutional relations to the United States." (Globe, p. 320.)

provides civil jurisdiction for the protection of the freedman. Under this constitutional amendment we can protect the freedman and accomplish something for his real benefit. (Globe, p. 297.)

However, Stewart was opposed to the movement to grant suffrage to the Negro. While he was "in favor of legislation under the constitutional amendment that shall secure to him a chance to live, a chance to hold property, a chance to be heard in the courts, a chance to enjoy his civil rights, a chance to rise in the scale of humanity, a chance to be a man" (Globe, p. 298), still he thought that Negro suffrage was not one of the issues of the war. If pushed, it would result in further conflict in the South. "Let no mere theory of the equality of races deprive us of peace and union." (*Ibid.*)

On the following day, January 19, 1866, Senator Hendricks of Indiana, a member of the Judiciary Committee, delivered a lengthy speech in opposition to the bill. Referring to the comprehensive language of section 7 of the bill, the civil rights section (*supra*, footnote 11), he questioned whether it might not even include Indiana, which had seen some fighting, and where some court proceedings might have been interrupted. If so, then anyone who attempted to execute the constitution and laws of the State would be liable for a violation of this measure, for

We do not allow to colored people there many civil rights and immunities which are enjoyed by the white people. It became the policy of the State in 1852 to prohibit the immigration of colored people into that State * * * Under that constitutional provision, and the laws enacted in pursuance

of it, a colored man coming into the State since 1852 cannot acquire a title to real estate, cannot make certain contracts, and no negro man is allowed to intermarry with a white woman. These are civil rights that are denied, and yet this bill proposes if they are still denied in any State whose courts have been interrupted by the rebellion, the military protection of the Government shall be extended over the person who is thus denied such civil rights or immunities. (Globe, p. 318.)

Senator Hendricks asserted that the Thirteenth Amendment, under which Congress purported to derive its power to enact such legislation, merely abolished the personal relation between master and slave. The law of the State authorizing this relation was annulled, but no new rights were conferred upon the freedman. (*Ibid.*) He offered his interpretation of section two of the Thirteenth Amendment:

If a man has been, by this provision of the Constitution, made free from his master, and that master undertakes to make him a slave again, we may pass such laws as are sufficient in our judgment to prevent that act; but if the Legislature of the State denies to the citizen as he is now called, the freedman, equal privileges with the white man, I want to know if that Legislature, and each member of that Legislature, is responsible to the penalties prescribed in this bill? It is not an act of the old master; it is an act of the State government, which defines and regulates the civil rights of the people. (Globe, p. 319.)

Senator Trumbull rose to defend his measure from this attack. The purpose of the legislation,

he stated, was to secure the rights of the freed-man, as guaranteed by the Constitution. Congress was authorized to do so, not only under the war powers and the Thirteenth Amendment, but also under the Constitutional provisions relating to the privileges and immunities of citizens and to the guaranty of a republican form of government to the States. (Globe, p. 319.) To be sure, the measure was to be based on the Thirteenth Amendment, for its purpose was to prevent enforcement of the Black Codes and of any laws restraining the liberty of the free Negro, all of which had been enacted in the interests of slavery and were abolished when slavery was abolished. (Globe, p. 322.) The bill would also permit the Negro to be made an independent man, for it is "to educate, improve, enlighten, and Christianize the negro * * *." (*Ibid.*)

I have no doubt that under this provision of the Constitution we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted * * *. (*Ibid.*)

As for Hendricks' remarks about the Indiana miscegenation laws, Senator Trumbull thought that those laws would not be affected at all. One of the purposes of the bill was to secure the same civil rights and subject to the same punishment persons of all races and colors. Since the miscegenation laws operated alike on both races, without discrimination against either in this respect that did not apply to both, he believed that this bill would not interfere with them. (*Ibid.*)

A brief debate occurred on January 20, 1866. Both Senators Cowan of Pennsylvania and Guthrie of Kentucky objected to the possibility that the bill might apply to their states. Cowan proposed an amendment restricting its coverage exclusively to states lately in rebellion. Both Senators claimed that Negroes already received equal protection of the laws in their states. (Globe, pp. 334, 335.) However, Senator Pomeroy of Kansas pointed out that it could not be true that the civil rights of persons of color in Kentucky were the same as those of white men, for he had never known a state that had permitted slavery which admitted testimony of colored persons to be received against white men. While Senator Guthrie conceded that that was still true in Kentucky, he said that the legislature was presently working on the problem. (Globe, p. 337.)

When debate resumed on January 22, Senator Creswell of Maryland voiced opposition to Cowan's amendment. He welcomed the operation of the measure in his own state, because "combinations of returned rebel soldiers have been formed for the express purpose of persecuting, beating mostly cruelly, and in some cases actually murdering the returned colored soldiers of the Republic. In certain sections of my State the civil law affords no remedy at all. It is impossible there to enforce against these people so violating the law the penalties which the law has prescribed for these offenses." (Globe, p. 339.)

Senator Cowan protested the necessity of these new laws. The present Constitution, he asserted, was sufficient to protect everyone in his rights.

If these so-called Black Codes were a thinly-disguised form of slavery, then, he said, they were clearly unconstitutional, and

there is no possible difficulty in obtaining a remedy for it anywhere and everywhere. The Supreme Court of the United States is sitting here for that purpose today, and the freedman is just as much entitled to the benefit of its protection, as I read the laws, as if he were a man of the fairest complexion and of the brightest Saxon mold. (Globe, p. 342.)

Cowan confessed an inability to understand, from the generalities used, just what was the equality the proponents were aiming for. What was meant by equality, as he understood it, was "in the language of the Declaration of Independence, * * * that each man shall have the right to pursue in his own way life, liberty, and happiness. That is the whole of it." (*Ibid.*)

Senator Wilson rose to answer that the equality which was to be enforced by this bill was not a matter of uniformity of person, "that all men shall be six feet high," as Cowan had suggested, but it did mean that the "poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and proudest man in the land." (Globe, p. 343.) Cowan's amendment was then defeated by a vote of 33 to 11. (Globe, p. 347.) Senator Davis of Kentucky proposed an amendment to make the Freedmen's Bureau subject to the jurisdiction of the state courts. It was defeated by a vote of 31 to 8. (Globe, p. 348.) Before the Senate adjourned for the day, various

other amendments on details of the bill were offered and disposed of. (Globe, pp. 348-349.)

On January 23, 1866, Senator Saulsbury of Delaware expressed his opposition to the bill. (Globe, p. 362.) From a practical point of view the measure would require too great an expenditure of money, and the patronage possibilities were too great. Besides, he claimed, the power to pass such a measure could not be derived from the Thirteenth Amendment, which only abolished the status of slavery. That Amendment could be carried into effect, and the status of freedom established, he asserted, without the exercise of such broad power, which encroached upon the fundamental rights of the states. (*Ibid.*)

These views were echoed by Senators McDougall, Hendricks and Davis. (Globe, pp. 367, 368, 370.) Senator Reverdy Johnson of Maryland announced that he would have liked to vote for the measure because he was very anxious to provide for the Negroes to a certain extent; unfortunately, he, too, had doubts as to the constitutionality of some of its provisions. (Globe, p. 372.)

Consideration on January 24, 1866, was largely devoted to the proposal of a series of amendments by various members of the opposition. They were all decisively defeated. (Globe, pp. 392-402.) On January 25, 1866, the final vote on the passage of the bill was taken. The measure passed by a vote of 37 to 10, and the Senate turned immediately to the consideration of Trumbull's Civil Rights bill. (Globe, p. 421.) (See *infra*, p. 40.)

In the House, a substitute bill was reported from the Select Committee on Freedmen by its

Chairman, Representative Eliot of Massachusetts, on January 30, 1866. (Globe, p. 512.) The substitute was the same as the Senate bill, except for some minor differences in details. The basic part of the bill relating to civil rights was left unchanged. Representative Donnelly of Minnesota immediately offered an amendment to empower the Bureau to provide "a common-school education for all refugees or freedmen who shall apply therefor."¹² (Globe, p. 513.)

The debate on the measure the following day, January 31, 1866, was confined largely to a long speech against Reconstruction policies generally by Mr. Dawson of Pennsylvania, in which he accused the majority of seeking to enforce absolute equality for the Negroes, so that

negroes should be received on an equality in white families, should be admitted to the same tables at hotels, should be permitted to occupy the same seats in railroad cars and the same pews in churches; that they should be allowed to hold offices, to sit on juries, to vote, to be eligible to seats in the State and national Legislatures, and to be judges, or to make and expound laws for the government of white men. Their children are to attend the same schools with white children, and to sit side by side with them. (Globe, p. 541.)

On February 1, 1866, Representative Donnelly took the floor for the bill and his amendment. He discussed the general reconstruction policies of

¹² On the final day of consideration of the bill, this amendment became ensnared in procedural difficulties, and did not become a part of the measure. See *infra*, p. 39.

the majority, but asserted the need to go further and provide for the education of the freedman. (Globe, p. 585.) Admittedly, this would be a revolutionary attempt, he said, but the Union had won the war and could dictate the terms. Those terms should provide for sweeping changes, for

He is indeed fearfully cramped by the old technicalities who can see in this enormous struggle only the suppression of a riot and the dispersion of a mob. This struggle has been as organic in its great meanings as the Constitution itself. (Globe, p. 586.)

The care of the freedman could not be left to the Southern states, for that would mean "the re-enslavement of the freedman or his reduction to a condition of peonage * * *. [The] indignation of the world would once more isolate the South; and they would meet that indignation as they met it in the old days of slavery, with dark and defiant brows." (Globe, p. 585.)

Mr. Donnelly turned then to the field of education:

The one great error of our country has been that education was not from the very first made a matter of the State, and as essential to the citizen as liberty itself. Education means the intelligent exercise of liberty, and surely without this liberty is a calamity, since it means simply the unlimited right to err. (Globe, p. 586.)

He cited the 1860 statistics of illiteracy in the nation, and particularly in the South, an illiteracy which he analyzed by comparison with the vote for Breckenridge in 1860, as being largely

responsible for secession. Therefore, since the Congress was already "interfering in behalf of the negro," let it "interfere to educate him." By this, he said,

We thus strike out at one blow a large proportion of the ignorance of the South; we shame the whites into an effort to educate themselves, and we prepare thus both classes for the proper exercise of the right of suffrage. (*Globe*, p. 587.)

However, if the bill was not passed, Donnelly asked, what would be the fate of the black man in the South? He turned to a consideration of the Black Codes, observing that a Negro "may be oppressed by a convocation of masters called a Legislature as fully as by a single master." (*Globe*, p. 588.) In the course of his review, he noted that the Black Code of Tennessee provided that "colored children shall not be admitted into the same schools with white children, while it makes no provision for their education in separate schools." (*Globe*, p. 589.) His conclusion was that these codes represented "slavery, less the protection which the master formerly afforded his chattel. The slave now has a mob for his master." (*Ibid.*)

Mr. Garfield of Ohio then spoke at length in favor of the bill. He declared that the Thirteenth Amendment did more than merely break off the chains of the slaves. It added four million citizens to the Republic. (*Globe*, Appendix, p. 66). And it must be declared that in this country the humblest, the lowest, the meanest of our citizens shall not be prevented from passing to the highest place he is worthy to attain; and

we must see to it, that hereafter, personal liberty and personal rights are placed in the keeping of the nation; that the right to life, liberty, and property shall be guarantied to the citizen in reality as they now are in the words of the Constitution, and no longer left to the caprice of mobs or the contingencies of local legislation. If our Constitution does not now afford all the powers necessary to that end, we must ask the people to add them. We must give full force and effect to the provision that "no citizen shall be deprived of life, liberty, or property without due process of law." We must make it as true in fact as it is in law, that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." We must make American citizenship the shield that protects every citizen, on every foot of our soil. The bill now before the House is one of the means for reaching this desirable result. (Globe, Appendix, p. 67.)

Consideration of the bill on February 2, 1866, was given over to a long speech in opposition by Representative Kerr of Indiana. (Globe, p. 618.) He believed that the Thirteenth Amendment did not confer the power for such an encroachment upon the rights of the states. In addition, the measure opened the way for patronage abuses.

On February 3, 1866, Representative Rousseau of Kentucky voiced his opposition to the bill, to the Donnelly amendment, and particularly to the Freedmen's Bureau efforts at educating the Negro. To him, the Bureau had been too high-handed in this matter, as evidenced by its taking over of the four white public schools in Charles-

ton, S. C., for colored students because the trustees had refused to permit the colored children to share in the facilities:

Here are four schoolhouses taken possession of, and unless they mix up white children with black, the white children can have no chance in these schools for instruction. (Globe, Appendix, p. 71.)

Representative Chanler, also of Kentucky, also referred to the same example of "usurpation and unlawfulness" of the Bureau in seizing the "only public schools of Charleston formerly used for the poor white children." (Globe, Appendix, p. 82.) It was his position that the "preemptive right in the soil is in the white race. The sovereignty of this Government springs from and belongs to the white race exclusively." (Globe, Appendix, p. 85.)

On February 5, 1866, Congressman Grinnell of Iowa responded that education of the freedman was essential, but that the opposition within the South was so strong that "loyal teachers" were closing their schools. (Globe, p. 651.) Even in Maryland, the resistance to Negro education was great:

Their schoolhouses have been burned since the sitting of this Congress, and so near to us that the very flames of the conflagration might have lighted up this Capitol. (Globe, p. 652.)

Mr. McKee of Kentucky observed that the Negroes had been emancipated as one of the natural results of the war; they could never be reenslaved: "As freedmen they must have the civil rights of freemen." (Globe, p. 654.)

At this time Representative Eliot withdrew the Committee bill, and offered another as a substitute. By this action, Mr. Donnelly's school amendment also was lost. (Globe, p. 654.) However, that proposal was incorporated in an amendment by Thaddeus Stevens to the substitute bill, which was in the nature of another substitute bill. (Globe, p. 655.) Both of these substitute bills made changes in details in the original Senate bill, but left the basic civil rights provisions untouched. Representative Smith of Kentucky also offered an amendment to exclude the State of Kentucky from the operation of the bill. (Globe, p. 659.)

On the following day, February 6, 1866, the House vote was to be taken. At that time, the Smith and Stevens amendments were both decisively defeated, while the Committee bill passed the House by a vote of 136 to 33. (Globe, p. 688.)

The House substitute bill was returned to the Senate for its concurrence. It was reported from the Judiciary Committee by Senator Trumbull on February 8, 1866, with additional amendments (Globe, p. 742), which are of no relevance here. The House bill, as amended, was concurred in, and the measure was returned to the House. (Globe, p. 748.) Final concurrence by the House took place on the following day, February 9, 1866, without discussion. (Globe, p. 775.)

The President vetoed the bill on February 19, 1866. His message echoed the arguments made by the opponents to the bill: The bill contained provisions which were not warranted by the Constitution; the bill would provide too much patronage; and the States would adequately protect the

rights of the freedmen. (Globe, p. 915.) By a vote of 30 to 18, the Senate failed to override the veto. (Globe, p. 943.) No further action was taken on this bill in either House.

C. CIVIL RIGHTS ACT OF 1866

The Civil Rights Act of 1866, 14 Stat. 27, originated in a bill (S. 61)¹³ "to protect all persons in the United States in their civil rights and furnish the means of their vindication," offered by Senator Trumbull of Illinois as complementary legislation to his Freedmen's Bureau bill (S. 60). The measures were introduced together on January 5, 1866 (Globe, p. 129); both were reported favorably from the Judiciary Committee on January 11, 1866 (Globe, p. 184), and were explained by Senator Trumbull together, on the following day (Globe, pp. 209, 211).

The Freedmen's Bureau bill was considered first by the Senate.¹⁴ On January 25, 1866, immediately after the final vote was taken on that measure, Senator Trumbull moved to take up the Civil Rights bill, and it was made the order of the day (Globe, pp. 421-422).

As reported, the bill provided that

There shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary

¹³ All references to bill numbers and the Congressional Globe in this section are to the 39th Congress, 1st Session.

¹⁴ See *supra*, p. 26.

servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. (Globe, p. 474.)

Should any person deprive an inhabitant of any right secured or protected by the bill, acting under color of law, statute, ordinance, or custom, he was subject to criminal proceedings in the Federal courts; and all civil suits involving the rights protected by the bill were removable to the Federal courts. (Globe, p. 475.) Section 3 of the bill, which provided additional facilities to the Federal courts for arrest and examination of alleged offenders, specifically declared that its purpose was to afford

reasonable protection to all persons in their constitutional rights of equality before the law without distinction of race or color * * *. (Globe p. 211.)

Consideration of the bill began on January 29, 1866. Before proceeding with his opening argument on behalf of the bill, Senator Trumbull offered an amendment to the first section of the bill, inserting a clause that

all persons of African descent born in the United States are hereby declared to be citizens of the United States * * *. (Globe, p. 474.)

Mr. Trumbull then reviewed the importance and necessity of providing national machinery to enforce the freedom which the Thirteenth Amendment guaranteed all persons:

There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits. (*Ibid.*)

The affirmation, he said, of the abstract truth of equality and freedom in the Declaration of Independence had been of no value to the enslaved Negro; the "privileges and immunities of citizens" had been of no aid to Mr. Hoar of Massachusetts some years before when he sought to enforce a constitutional right in the courts of South Carolina; and the emancipation of the Negro was of no benefit if the laws of the Southern States, then being enacted and enforced, deprived a freedman of the "privileges which are essential to freemen." (*Ibid.*) With the promulgation of the Thirteenth Amendment, he said, the Black Codes, which made distinctions on account of color, became null and void as a part of slavery; but since they had been reenacted to discriminate against freedmen, it was necessary to enact the bill to carry the Amendment into effect, for

any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited. (*Ibid.*)

These Black Codes, in many instances, he continued, were founded upon a misunderstanding of the concept of citizenship:

The people of those States have not regarded the colored race as citizens, and on that principle many of their laws making discrimination between the whites and the colored people are based * * *. (Globe, p. 475.)

Therefore, it was necessary to declare Negroes citizens, in order to entitle them to equality of treatment with all other citizens, and to have the means of enforcing their equal rights. When it would be fully understood

in all parts of the United States that any person who shall deprive another of any right or subject him to any punishment in consequence of his color or race will expose himself to fine and imprisonment * * *,

such acts would cease. (*Ibid.*)

Senator Saulsbury asserted that this was one of the most dangerous bills ever introduced into the Senate of the United States. He denied that there was any power under the Constitution to enact such a measure. The Thirteenth Amendment only broke the bonds of slavery, making it impossible for one man to own another, and it placed the former slaves upon a par with the free Negro population. But that Amendment conferred no power to elevate the whole race to an equality with the white race (Globe, p. 476); for a man "may be a free man and not possess the same civil rights as other men." (Globe, p. 477.) If the proponents of the Thirteenth Amendment had "intended to bestow upon the freed slave all the rights of a free citizen, you ought to have gone further in

your constitutional amendment, and provided that * * * there should be no inequality in civil rights." (*Ibid.*)

In examining the bill itself, Senator Saulsbury inquired as to the meaning of the broad term "civil rights," which were to be guaranteed to the freedmen. Although Senator Trumbull had denied that he had intended to confer the political right of suffrage by this bill, Saulsbury thought that the bill could be so interpreted:

A civil right I define to be a right belonging to the citizen, and which he possesses only by virtue of citizenship * * * the rights which I have by reason of the law of the State under which I live, whether they be rights secured by the fundamental law, the constitution of the State, or be secured by enactments of the Legislature.

The right to vote is not a natural right; I did not possess it by nature, I only possess it by virtue of law. * * * it is a civil right, and is a right of no other class or character. (*Globe*, pp. 477-478.)

To Senator Saulsbury, such legislation invaded the field reserved to the operation of state laws and he could not support it. (*Globe*, p. 478.)

Consideration of the bill was resumed on January 30, 1866, with a speech by Senator Van Winkle of West Virginia. (*Globe*, p. 497.) He doubted that the Negroes were presently citizens of the United States, or that they could become citizens other than by a constitutional amendment. But if they should be made citizens, "I should feel that they were entitled to the right of suffrage." (*Ibid.*) In any event, he did not

believe citizenship could be established by this clause in Trumbull's bill, even under the naturalization power of Congress. (Globe, p. 498.)

At this point Senator Trumbull withdrew his earlier amendment to the bill, and moved to insert the following clause:

All persons born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States, without distinction of color * * *. (*Ibid.*)¹⁵

Senator Cowan objected to this clause, pointing out that it would make citizens of Indians and Asiatics as well as Negroes. (*Ibid.*) To him, the Thirteenth Amendment conferred no such power. It merely broke the bond by which the Negro slave was held by his master. It was not intended "to overturn this Government and to revolutionize all the laws of the various States everywhere." (Globe, p. 499.) As for the bill as a whole,

* * * as I understand the meaning and intent of this bill, it is that there shall be no discrimination made between the inhabitants of the several States of this Union, none in any way. In Pennsylvania, for the greater convenience of the people, and for the greater convenience, I may say, of

¹⁵ With this amendment, the first section read:

That all persons born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States, without distinction of color, and there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery * * *.

both classes of the people, in certain districts the Legislature has provided schools for colored children, has discriminated as between the two classes of children. We put the African children in this school-house and the white children over in that school-house, and educate them there as we best can. Is this amendment to the Constitution of the United States abolishing slavery to break up that system which Pennsylvania has adopted for the education of her white and colored children? Are the school directors who carry out that law and who make this distinction between these classes of children to be punished for a violation of this statute of the United States? To me it is monstrous. How anybody desiring to be fair, desiring to construe the Constitution according to its fair intent and meaning, can drag out of it such a conclusion, such a monstrous conclusion as this, I cannot see. (Globe, p. 500.)

Cowan stated that he was perfectly willing to vote for an amendment to the Constitution "which will secure to all men of every color and of every race and of every condition their natural rights, the rights which God has given them, the right to life, the right to liberty, the right to property." But this bill was an attempt to do the same thing without any constitutional authorization. (*Ibid.*)

Senator Howard, a member of the Judiciary Committee at that time, took occasion to point out that in drafting the Thirteenth Amendment

it was in contemplation of its friends and advocates to give to Congress precisely the power over the subject of slavery and

the freedmen which is proposed to be exercised by the bill now under our consideration. (Globe, p. 503.)

The intention had been to make the Negro the opposite of a slave, to make him a freeman, entitled to "those rights which we concede to a man who is free," so that

in respect to all civil rights * * * there is to be hereafter no distinction between the white race and the black race. (Globe, p. 504.)

Senator Reverdy Johnson, counsel for the defendant in the *Dred Scott* Case, argued that under that decision Congress could not by statute naturalize a native-born Negro. (Globe, p. 504.) His opinion was that the citizenship of the Negro could "only be safely and surely attained by an amendment of the Constitution." (*Ibid.*)

On January 31, 1866, Senator Garrett Davis rose to speak against Trumbull's amendment. (Globe, p. 522.) He denied the power of Congress to make citizens in this manner. (Globe, p. 523.) It was his contention that Negroes were not citizens when the Constitution was adopted (Globe, p. 524); that the free Negroes were not citizens before the adoption of the Thirteenth Amendment (Globe, p. 525); and that they could not now become citizens, even under the naturalization power of Congress. (Globe, p. 529.) Senator Johnson interposed to state that, but for the *Dred Scott* decision, Congress could legislate directly to make citizens of the Negroes. Even in the face of that decision, he conceded that, since the point was argumentative,

it was not unreasonable to suppose that the present Supreme Court might sustain the authority of Congress in this regard. (Globe, p. 530.) Senator Davis, however, remained of the view that it was a principle of this Government that "nobody but white people are or can be parties to it." (*Ibid.*)

On February 1, 1866, Senator Morrill of Maine spoke in favor of the citizenship clause. (Globe, p. 570.) He stated that it was an extraordinary act, unparalleled in the history of this or any country; however, he found Senator Davis' assertion that the proposition was revolutionary as furnishing no reason for its rejection:

I freely concede that it is revolutionary. I admit that this species of legislation is absolutely revolutionary. But are we not in the midst of revolution? * * * Are we not in the midst of a civil and political revolution which has changed the fundamental principles of our Government in some respects? (*Ibid.*)

Senator Morrill denied a previous assertion by Senator Cowan that American society had been established upon the principle of exclusion of inferior races. To the contrary, American society, either civil or political, was not formed in the interest of any race or class. America had, since the earliest days, been held up as a land of refuge, an asylum for the oppressed of all nations and all races. He denied that our Government

was organized in the interest of any race or color, and there is neither "race" nor "color" in our history politically or civilly—not a bit of it. Is there any "color" or "race" in the Declaration of Independ-

ence, allow me to ask? "All men are created equal" excludes the idea of race or color or caste. There never was in the history of this country any other distinction than that of condition, and it was all founded on condition. (Globe, pp. 570-571.)

The speech concluded with an examination of the *Dred Scott* decision, and the assertion that the Negro had been denied citizenship there, not on account of his race or color, but only because of his enslaved condition. (Globe, p. 571.)

A discussion then arose over the inclusion of Indians in Senator Trumbull's citizenship clause (Globe, pp. 571-574), and concerning the phrase "without distinction of color" (Globe, p. 573). Senator Trumbull stated that the words of the Declaration of Independence applied to the black as well as the white man. He agreed that the meaning of the clause would be the same without the phrase, but pointed out that he wished to place the matter beyond any question. (Globe, pp. 573-574.) Senator Hendricks of Indiana dissented entirely from this construction of the Declaration of Independence, but agreed that

in defining the right of citizenship there should be no room for doubt. The question that is before this Congress, and that must now go to the country, is that which was started by the Senator from Massachusetts [Mr. Sumner], whether all persons living in this country are to be equal before the law without distinction of color. * * * I am perfectly content that that question shall go to the country. If the people agree to the proposition, I am content; if it is satisfactory to the white

men of this country to admit into the political community Indians and other colored people, I shall no longer object; but I am gratified that the Senator from Illinois makes it in plain words, so that the issue shall be distinctly before the people. (Globe, p. 574.)

The citizenship clause was revised by Senator Trumbull to read as follows:

All persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States, without distinction of color.

In this form Senator Trumbull's amendment to section one of the bill was agreed to by the Senate, by a vote of 31 to 10. (Globe, p. 575.)

On February 2, 1866, the day set for the final vote, Senator Davis of Kentucky renewed his opposition to the measure. (Globe, p. 595.) He held that there was no power to pass any law connected with the subject of this bill except what was contained in the "privileges and immunities" clause in the Constitution. Since Senator Trumbull had declared that his measure was merely declaratory of the principles of the Constitution, he (Davis) offered an amendment, as a substitute for the entire bill. Section one of Senator Davis' substitute merely repeated the language of the "privileges and immunities" clause, while section two provided for civil and criminal penalties against anyone who would deprive "a citizen of any of the United States * * * of any privilege or immunity in any other State to which such citizen is

entitled under the Constitution and laws of the United States * * *." (*Ibid.*) This substitute, he asserted, would preserve the integrity of the states, leaving them free to determine their own citizens. Under it, the United States could enforce their citizens' rights in other states. (*Ibid.*) On the other hand, Senator Trumbull's measure, if enacted, would be "centralizing with a vengeance and by wholesale." (*Globe*, p. 598.) It "breaks down all the domestic systems of law that prevail in all the States, so far not only as the negro, but as any man without regard to color is concerned, and [it] breaks down all the penal laws that inflict punishment or penalty upon all the people of the States except so far as those laws shall be entirely uniform in their application." (*Ibid.*)

Senator Trumbull repeated that his measure was merely a bill providing that all people shall have equal rights. It was not deserving, he said, of the epithets Senator Davis had applied to it. He denied that it was for the sole benefit of Negroes:

Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights * * *. With what consistency and with what face can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when the very object of the bill is to break down all discrimination between black men and white men?

Now sir, what becomes of all the Senator's denunciation? The bill is applicable exclusively to civil rights. It does not propose to regulate the political rights of indi-

viduals; it has nothing to do with the right of suffrage, or any other political right; but is simply intended to carry out a constitutional provision, and guaranty to every person of every color the same civil rights. (Globe, p. 599.)

Believing that all the laws authorizing slavery had fallen, Senator Guthrie of Kentucky claimed that he had advised the people of his state

to put these Africans upon the same footing that the whites are in relation to civil rights. They have all the rights that were formerly accorded to the free colored population in all the States just as fully this day as they will have after this bill has passed, and they will continue to have them. (Globe, p. 600.)

He asserted that, in carrying out the amendment to the Constitution, he was determined to do as equal justice to the black man as to the white man in all respects. But he did not believe that

there is any authority under it to overturn the State governments, and permitting the Federal Government to run into the States to make laws on this subject when it enters into the States for nothing else. (Globe, p. 601.)

Senator Hendricks observed that the bill provides "that the civil rights of all men, without regard to color, shall be equal * * *" in order to "place all men upon an equality before the law * * *." (Globe, p. 601.) But, "in the State of Indiana we do not recognize the civil equality of the races." (Globe, p. 602.) He was opposed to the measure, therefore, because of the conflicts to which it would lead between the state and national governments. Concluding, he suggested

an amendment to strike out some of the enforcement provisions of the bill. (*Ibid.*)

Senator Lane of Indiana, favoring the bill, said that its object was to secure the freedmen in the possession of all the rights, privileges, and immunities of free men. In other words, he asserted, Congress was merely giving effect to the proclamation of emancipation and the Thirteenth Amendment. (*Ibid.*) Senator Wilson of Massachusetts claimed that the measure was necessary because the new Southern legislatures, "in defiance of the rights of the freedmen and the will of the nation embodied in the amendment to the Constitution, have enacted laws nearly as iniquitous as the old slave codes that darkened the legislation of other days." (*Globe*, p. 603.)

However, Senator Cowan of Pennsylvania expressed the objection that

This is a proposition to repeal by act of Congress all State laws, all State legislation, which in any way create distinctions between black men and white men in so far as their civil rights and immunities extend. It is not to repeal legislation in regard to slaves. (*Ibid.*)

Finally, the time set aside for the vote was reached. The Hendricks and Davis amendments were rejected, and the bill itself was passed by the Senate on February 2, 1866, by a vote of 33 to 12. (*Globe*, p. 606.)

In the House, on March 1, 1866, Representative James A. Wilson of Iowa, Chairman of the Judiciary Committee, reported the bill favorably, but with amendments. (*Globe*, p. 1115.) The only relevant amendment, which consisted of replacing

the term "inhabitants of" by "citizens of the United States in," in the first section, was

intended to confine the operation of this bill to citizens of the United States, instead of extending it to the inhabitants of the several States, as there seems to be some doubt concerning the power of Congress to extend this protection to such inhabitants as are not citizens. (*Ibid.*)¹⁶

After all the Committee amendments had been agreed to, Wilson moved to recommit the bill, as a procedural device explicitly intended to cut off further amendments. In his opening speech, he admitted that the questions raised by the bill were difficult, and the precedents in sharp conflict. (Globe, p. 1115.) It was, however, plain to him that Negroes freed under the Thirteenth Amendment were citizens, even without the declaration in the bill, a conclusion which he bolstered by citations of administrative precedents and by

¹⁶ Another amendment, added, as asserted by Wilson, to conform the rest of the section to the change made by this amendment, was the insertion of the phrase "as is enjoyed by white citizens," so that the section read:

* * * shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, as is enjoyed by white citizens, * * * (*Ibid.*)

The place where this phrase was inserted was the wrong one, either through an error in the Congressional Globe or an inadvertence by Mr. Wilson. The later debates, see *infra*, p. 62, and the final Act itself, 14 Stat. 27, show that the phrase was intended to be inserted after the clause "and to full and equal benefit of all laws and proceedings for security of person and property," and not just before that clause.

castigation of the *Dred Scott* case for holding otherwise. (Globe, p. 1116.) It was competent, he said, for the Congress, and not a matter for the states, to declare who were citizens of the United States. As for the remainder of the first section, it provided for the equality of citizens in the enjoyment of certain "civil rights and immunities":

What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they so be construed. Do they mean that all citizens shall vote in the several States? No; for suffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government. Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools. These are not civil rights or immunities. (Globe, p. 1117.)

On the other hand, civil rights did include, he asserted, those rights included in the definition of the term in Bouvier's Law Dictionary, those rights which "have no relation to the establishment, support, or management of government." Wilson concluded

that it is easy to gather an understanding that civil rights are the natural rights of man; and these are the rights which this bill proposes to protect every citizen in the enjoyment of throughout the entire dominion of the Republic. (*Ibid.*)

The term "immunities" was clearer in its meaning—in this regard the bill merely "secures to citizens of the United States equality in the exemptions of the law." (*Ibid.*)

There was no question, Mr. Wilson said, in his mind that Congress could enact the measure, for

this bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law. We are following the Constitution. We are reducing to statute form the spirit of the Constitution. (*Ibid.*)

The rights to be protected already belong to every citizen, as part of the "privileges and immunities" of United States citizenship under Article 4 of the Constitution. (*Ibid.*) If every state acknowledged and guaranteed this protection, this measure would not be necessary. But the practice of the states forced the Federal Government to supply the protection which the states denied:

Mr. Speaker, if all our citizens were of one race and one color we would be relieved of most of the difficulties which surround us. This bill would be almost, if not entirely, unnecessary, and if the States, seeing that we have citizens of different races and colors, would but shut their eyes to these differences and legislate, so far at least as regards civil rights and immunities, as though all citizens were of one race and color, our troubles as a nation would be well-nigh over. But such is not the case, and we must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men. (*Globe*, p. 1118.)

As to those citizens in danger of involuntary servitude through deprivation of civil rights, power rested also in the Thirteenth Amendment. (*Ibid.*) For all others, it rested on the general powers to protect national citizens:

If citizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect, and to equality in the exemptions of the law, we must of necessity be clothed with the power to insure to each and every citizen these things which belong to him as a constituent member of the great national family. (*Ibid.*)

Representative Raymond of New York offered, as a possible amendment, striking the words "free white" from the naturalization laws, and declaring everyone born in the United States to be a citizen. (*Globe*, p. 1120.) An amendment was also offered by Representative Shanklin of Kentucky to declare that nothing in the bill would confer the right to vote on Negroes, mulattoes and Indians. (*Ibid.*)

Representative Rogers of New Jersey, a member of the Judiciary Committee, objected to the bill on constitutional grounds. There was, he said, no authorization under the Constitution for such a measure. As a matter of fact, Representative Bingham's current proposal to amend the Constitution in order to confer this very power¹⁷ implied an opinion by the majority of the Joint Committee on Reconstruction that there was no

¹⁷ This reference was to Bingham's "equal rights" amendment, see *infra*, p. 83.

such power at present. (*Ibid.*) If Congress had the power to pass this bill, then it had the right not only to extend all the rights and privileges to colored men that are enjoyed by white men, but has the right to take [them] away. (*Ibid.*)

Under this view, Mr. Rogers concluded that a fair interpretation of the bill would mean that Congress could enter a State, and supersede its normal domestic regulations:

In the State of Pennsylvania there is a discrimination made between the schools for white children and the schools for black. The laws there provide that certain schools shall be set apart for black persons, and certain schools shall be set apart for white persons. Now, if this Congress has a right, by such a bill as this, to enter the sovereign domain of a State and interfere with these statutes and the local regulations of a State, then, by parity of reasoning, it has a right to enter the domain of that State, and inflict upon the people there, without their consent, the right of the negro to enjoy the elective franchise to the same extent that it is accorded to the white men in that State, * * *. (Globe, p. 1121.)

Mr. Cook of Illinois expressed surprise at Rogers' apprehension that the bill was designed to deprive somebody in some state of the Union of some right which he had previously enjoyed. It was his belief that the bill was constitutional and would deprive no one, black or white, of any rights. (Globe, p. 1123.) "It is said," he remarked, "that this measure is unconstitutional. Then let us amend the Constitution so as to

render such legislation proper." (Globe, p. 1125.)

At the opening of debate on March 2, 1866, Representative Thayer of Pennsylvania contended that under statutory rules of construction the bill could not be construed to alter state laws on suffrage, as Rogers had feared, for,

the words themselves are "civil rights and immunities," not political privileges; and nobody can successfully contend that a bill guarantying simply civil rights and immunities is a bill under which you could extend the right of suffrage, which is a political privilege and not a civil right.

Then, again, the matter is put beyond all doubt by the subsequent particular definition of the general language which has been just used; and when those civil rights which are first referred to in general terms in the bill are subsequently enumerated, that enumeration precludes any possibility that the general words which have been used can be extended beyond the particulars which have been enumerated. (Globe, p. 1151.)

Thayer also was concerned with the issue of power to declare a freedman a citizen. It was his view that

by virtue of the second section of the amendment of the Constitution Congress has express power to pass laws which will guaranty and insure these great rights and immunities of citizenship to those who, by the act of emancipation and the amendment of the Constitution, were made freemen, and who in becoming freemen became citizens. (Globe, p. 1152.)

If there should be any doubt as to the status of the Negro, the Congress had "ample authority to confer the rights of citizenship upon this class of persons" under the naturalization power. (Globe, pp. 1152, 1153.) He concluded by stating his approval of Bingham's proposition to put the protection of equal rights into the Constitution, although he doubted the necessity of such action. Still, "in order to make things doubly secure," he would vote for Bingham's proposal. (Globe, p. 1153.)

Representative Eldridge of Wisconsin pointed out that when the Bingham joint resolution to amend the Constitution had been proposed, Mr. Thayer had supported it on the ground, advanced by Bingham, that under the present Constitution there was no warrant to enter a state to protect a citizen in his rights of life, liberty, and property. Now, he observed, Mr. Thayer seemed to differ in all his claims from Mr. Bingham. (Globe, p. 1155.)

Although Representative Thornton of Illinois was opposed to the bill, he conceded that the Thirteenth Amendment necessarily made the Negro a citizen in the act of making him a free man. (Globe, p. 1157.) Representative Windom of Minnesota expressed the belief that the bill was in strict conformity with the spirit and design of the original architects of the Republic. Had this design been followed by those who built the superstructure, he felt that the country might have been spared the horror of the war. For,

A true republic rests upon the absolute equality of rights of the whole people, high and low, rich and poor, white and black.

Upon this, the only foundation which can permanently endure, we professed to build our Republic; but at the same time we not only denied to a large portion of the people equality of rights, but we robbed them of every right known to human nature. (Globe, p. 1159.)

At this point, Mr. Wilson withdrew his motion to recommit the bill, and proceeded to offer some amendments. Most were technical, and not material here; one, however, was an express proviso excluding the right of suffrage from the rights protected by the bill. Wilson stated that this addition did not change his construction of the bill, since he did not believe the term "civil rights" included the right of suffrage. After all of these amendments were adopted, he renewed his motion to recommit, and the House moved on to the consideration of other measures. (Globe, pp. 1161-1162.)

Debate on the Civil Rights bill was not resumed until March 8, 1866. At that time Representative Broomall of Pennsylvania argued that the evils which the bill would correct were not limited in their scope to the black man. He contended that white men, citizens of the United States, had been and were then being punished under color of state laws for having refused to commit treason; that soldiers of the Republic had been arraigned in state courts, under state laws, for the crime of shooting traitors on the field of battle by command of military superiors, and had been saved from punishment only by the interposition of the Freedmen's Bureau. He maintained, further, that

white men, citizens of the United States, have been driven from their homes, and

have had their lands confiscated in State courts, under State laws, for the crime of loyalty to their country, and that now they are begging in vain for a redress of wrongs in the courts of the reconstructed South. (Globe, p. 1263.)

Representative Raymond of New York spoke in behalf of his substitute bill.¹⁸ He declared that the pending measure had worthy objects, and that he would gladly vote for any such bill if convinced of its constitutionality. Unfortunately, he had doubts as to the constitutionality of section two, the penal section. (Globe, pp. 1266-1267.)

Mr. Delano of Ohio stated his belief that no law was necessary to make the emancipated people citizens. In his opinion, they were already citizens. (Globe, Appendix, p. 156.) However, as for the rest of the bill he had doubts as to the power of Congress under the existing Constitution to pass such a measure. Despite Mr. Wilson's disclaimer that the bill conferred the right to act as a juror, Delano felt that section one necessarily conferred that right in the clause, "to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." (Globe, Appendix, p. 157.) Wilson replied that those words had not been in the original bill, but were inserted by an amendment offered by himself:¹⁹ "It was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be ex-

¹⁸ See, *supra*, p. 57.

¹⁹ See, *supra*, note 16.

tended to all citizens, whether male or female, majors or minors. So that the words are intended to operate as a limitation and not as an extension * * *." (*Ibid.*) Delano continued his objections by pointing to the phrase in the same section, "That there shall be no discrimination in civil rights or immunities among the citizens of the United States in any State or Territory." He supposed that the enumeration of specific rights following this general declaration operated as a limitation upon it. But then the phrase to which he had previously referred followed after this enumeration, and, in his view, seemed to be an enlargement or extension of the specific rights enumerated in the bill. Under this construction, he asserted, the question whether the right to be a juror was conferred by the measure was still a debatable one. (*Ibid.*) Delano thought, therefore, that the bill could be interpreted to encroach upon the reserved rights of the state under the Constitution. It appeared to him that "the authority assumed as the warrant for this bill would enable Congress to exercise almost any power over a State." (*Globe*, Appendix, p. 158.) He expressed strong doubts as to the authority of Congress

to go into the States and manage and legislate with regard to all the personal rights of the citizen * * *. (*Ibid.*)

Mentioning, as examples, state laws defining who would be entitled to testify in court, Mr. Delano continued,

we once had in the State of Ohio a law excluding the black population from any participation in the public schools or in the

funds raised for the support of those schools. That law did not place, of course, the black population upon an equal footing with the white, and would, therefore, under the terms of this bill be void, and those attempting to execute it would be subjected to punishment by fine or imprisonment. (*Ibid.*)

While the extreme assertion of state rights was a contributing cause of the war, to him

it is just as important that we should not swing back into the assertion of powers in this Government that do not belong to it * * *. (Globe, Appendix, p. 159.)

He concluded, therefore, that since authority for this bill was not conferred by the Thirteenth Amendment, Congress should first take up and submit for ratification the amendment to the Constitution offered by Mr. Bingham. When that amendment had become part of the fundamental law, then Congress could proceed "to secure the rights of these persons in a way in which we shall not be trampling down or endangering the fundamental law of the land." (*Ibid.*)

Upon the conclusion of this speech, Representative Kerr of Indiana rose to present his objections to the measure. In his view, the declaration of citizenship was wholly unauthorized, for the naturalization power did not permit Congress to declare native-born non-citizens to be citizens. (Globe, p. 1267.) The Thirteenth Amendment did not grant that authority, nor did it authorize civil rights legislation to enlarge

the rights and privileges of negroes, not as subjects of the Federal Government, but

as subjects or citizens of the several States." (Globe, p. 1268.)

All that amendment had done was to sever the relation of master and slave, and to prevent involuntary servitude. He asked:

Is it slavery or involuntary servitude to forbid a free negro, on account of race and color, to testify against a white man? Is it either to deny to free negroes, on the same account, the privilege of engaging in certain kinds of business in a State in which white men may engage, such as retailing spirituous liquors? Is it either to deny to children of free negroes or mulattoes, on the like account, the privilege of attending the common schools of a State with the children of white men? * * * It will require a most vigorous exercise of the imagination to give affirmative answers to those questions. (*Ibid.*)

Mr. Kerr then elaborated on the problems of the differing character of State and national citizenship:

We should not confound the rights of citizenship which a State may confer within its own limits and the rights of citizenship as a member of the Union. (*Ibid.*)

Before the adoption of the Constitution, he asserted, a State could confer on whomsoever it pleased the character and rights of citizenship. (*Ibid.*) Moreover:

The States have not surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or anyone it thinks proper, or upon any class or description of per-

sons; yet they would not be citizens in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in its courts, nor to the privileges and immunities of citizens in the other States. (*Ibid.*)

The naturalization power of Congress extended only to confer a "general citizenship" in the Union, which had nothing whatever to do with conferring the rights inherent in State citizenship. (*Ibid.*) All the privileges and immunities clause of Article 4 conferred was the negative right of a citizen of the Union, domiciled in one State and sojourning in another, to be free from discrimination on account of his "foreign" residence. (*Globe*, p. 1269.) He was not, however, specially protected against being accorded the treatment ordinarily due to others of the same general class in which he fell, apart from residence. (*Ibid.*) Consequently, Congress could not claim to be empowered, in protecting its own citizens, to invade the States in order to prescribe what rights the States should accord to State citizens, and others sojourning there. (*Globe*, p. 1270.)

Moreover, Mr. Kerr did not agree with any narrow definition of the term "civil rights and immunities," and pointed to the confused definitions offered by the proponents of the bill. (*Ibid.*) He referred to the statutes of Indiana, forbidding licenses to sell spirituous liquors to any but white males, a discrimination of both color and race. The right to the license was probably to be deemed a civil right; but even if it were not,

yet a license is a contract, and this bill says the negro shall have "the same right to make

and enforce contracts" as the white man. * * * Again, the constitution of Indiana has dedicated a munificent fund to the support of common schools for the education of the children of the State. But negro and mulatto children are by law excluded from those schools. Negroes and mulattoes are exempt by law from school tax. They are denied a civil right, on account of race and color, and are granted an immunity, (from school taxation) but are taxed for all other purposes. Now, a negro or mulatto takes his child to the common schoolhouse and demands of the teacher that it be admitted to the school and taught as the white children are, which is refused. The teacher then becomes a wrong-doer and is liable to the same punishments, to be administered in the same way; because all the persons referred to would be acting under *color* of some law, statute, ordinance, regulation, or custom. (Globe, p. 1271.)

After Mr. Kerr had concluded his speech, Representative Bingham offered an amendment to the motion to recommit, to instruct the Committee to strike out the broad language relating to "civil rights and immunities." He also wished stricken all the penal provisions of the bill, substituting therefor a provision granting the remedy of a civil action for damages to one whose rights had been violated. (*Ibid.*)²⁰

The following day, March 9, 1866, Bingham was allowed thirty minutes to speak on behalf of his amendment. (Globe, p. 1290.) He stated, at the

²⁰ This proposal by Bingham had already been endorsed, in advance of its offer, in preceding speeches by Representatives Raymond (Globe, p. 1267), and Delano. (Globe, App., p. 156.)

outset, that even if his proposed changes were adopted, the Congress had no authority to pass the bill; but by striking out the broad language of the bill, and removing its criminal penalties, he asserted, its "oppressive" effects would be eliminated. (*Ibid.*)

To Bingham, there was no objection to the declaration of the citizenship of the Negro, for that was a fully authorized exercise of power by Congress; but,

in view of the text of the Constitution of my country, in view of all of its past interpretations, in view of the manifest and declared intent of the men who framed it, the enforcement of the bill of rights, touching the life, liberty, and property of every citizen of the Republic within every organized State of the Union, is of the reserved powers of the States, to be enforced by State tribunals and by State officials acting under the solemn obligations of an oath imposed upon them by the Constitution of the United States. (*Globe*, p. 1291.)

In discussing the general language of the first section of the bill, Mr. Bingham referred to Representative Wilson's views. He pointed out that the latter had privately said that he did not regard the "clause in the first section as an obligatory requirement." (*Globe*, p. 1291.) To Mr. Bingham, however, that clause was "as obligatory as any other clause of the section." Consequently, since "civil rights" was a very broad term, including every right of the citizen, not excepting suffrage,

* * * what, then, is proposed by the provision of the first section? Simply to strike down by congressional enactment

every State constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen. (*Ibid.*)

Most states did have such discriminatory laws. With the objective of eliminating such laws, Bingham agreed entirely, but that should be achieved by the law and voluntary act of each State:

The law in every State should be just; it should be no respecter of persons. It is otherwise now, and it has been otherwise for many years in many of the States of the Union. I should remedy that not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future. (*Ibid.*)

In limiting the operation of the bill to "citizens," he claimed, the House revisers of the bill had discriminated against aliens; to reach all equally with protection, it was necessary to use "persons," for, while

the bill of rights, as has been solemnly ruled by the Supreme Court of the United States, does not limit the powers of States and prohibit such gross injustice by States, it does limit the power of Congress and prohibit any such legislation by Congress. (Globe, p. 1292.)

The Freedman's Bureau bill he distinguished by reason of its application only to the insurrectionary States, and only so long as the courts were "stopped in the peaceable course of justice" by civil unrest. (*Ibid.*) But when peace should be restored and the courts opened, the ordinary

limitations of the Constitution would apply, under which

the care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. (*Ibid.*)

Mr. Bingham asserted that even his proposed constitutional amendment did not seek to disturb that traditional limitation. It sought

to affect no change in that respect in the Constitution of the country. (*Ibid.*)

On the contrary, it sought only to provide power in Congress to punish all violations by State officers of their obligations to uphold the Constitution and the bill of rights,

* * * but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution. (*Ibid.*)

Borrowing de Tocqueville's phrase, this would continue "centralized government, decentralized administration" (*Ibid.*), which is the strength of this country:

I have always believed that the protection in time of peace within the States of all of the rights of person and citizen was of the powers reserved to the States. And so I still believe. (Globe, p. 1293.)

Representative Shellabarger of Ohio echoed Bingham's constitutional doubts, but, in view of the great need for such protection, he resolved his doubts in favor of the bill. "Its whole effect," he said, "is not to confer or regulate rights, but to require that whatever of these enumerated

rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery." (Globe, p. 1293.)

Wilson again took the floor to rebut these objections, many of which had come from members of his own party. (Globe, p. 1294.) To him, it was wholly beyond reason that the United States, which

can draw the citizen by the strong bond of allegiance to the battle-field, has no power to intervene and set aside a State law, and give the citizen protection under the laws of Congress in the courts of the United States * * *. (*Ibid.*)

Wilson stated that the term "civil rights and immunities" as used in this bill, and as properly construed, did not comprise all civil rights and immunities. Mr. Bingham had tried to tell the House, he asserted, that in the terms of this bill,

are embraced those rights which belong to the citizen of the United States as such, and those which belong to a citizen of a State as such; and that this bill is not intended merely to enforce equality of rights, so far as they relate to citizens of the United States, but invades the States to enforce equality of rights in respect to those things which properly and rightfully depend on State regulations and laws. (*Ibid.*)

Mr. Wilson, however, observed that the "gentleman from Ohio" was too able a lawyer to put forth seriously such a construction of the bill; for

when he talks of setting aside the school laws and jury laws and franchise laws of the States by the bill now under consideration, he steps beyond what he must know to be the rule of construction which must apply here, and as the result of which this bill can only relate to matters within the control of Congress. (*Ibid.*)

Four days later, on March 13, 1866, the bill was reported again with amendments, as urged by Representatives Delano and Bingham, striking out the general language relating to "civil rights or immunities", and leaving only the individual rights specified. (Globe, p. 1366.) Mr. Wilson explained that the elimination of the general language did not materially change the bill, for, he still maintained, under accepted rules of construction, the specific language had limited the general. However,

some gentlemen were apprehensive that the words we propose to strike out might give warrant for a latitudinarian construction not intended. (*Ibid.*)

A few other amendments, not relevant here, were also reported. All the amendments were adopted by the House. In answer to an inquiry on the omission from the final bill of the proviso explicitly excluding the right of suffrage from the operation of the bill, Wilson replied that

Some members of the House thought, in the general words of the first section in relation to civil rights, it might be held by the courts that the right of suffrage was included in those rights. To obviate that difficulty and the difficulty growing out of any other construction beyond the specific

rights named in the section, our amendment strikes out all of those general terms and leaves the bill with the rights specified in the section. Therefore the amendment referred to by the gentleman is unnecessary. (Globe, p. 1367.)

With these changes, on March 13, 1866, the bill then passed the House by a vote of 111 to 38, although Bingham still voted against it. (*Ibid.*) The Senate, after a brief and largely immaterial discussion on March 15, 1866, concurred in all the House amendments, and sent the measure to the President. (Globe, pp. 1413-1416.)

On March 27, the President returned the bill without approval. (Globe, pp. 1679-1681.) His message was in large part a repetition of the arguments in the Congress against the bill. The former slaves, he asserted, did not possess as yet the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States. Moreover, the President believed that Congress did not have the authority to destroy the federative system by such a centralization of power as that required to provide the proposed safeguards for the colored race, which went beyond anything that the General Government had ever provided for the white race. (*Ibid.*)

The veto did not come up for discussion until April 4, 1866, when Senator Trumbull reviewed what he claimed to be the inadequacies and errors of the message, point by point. (Globe, pp. 1755-1761.) He regretted that the President should have thus alienated himself "from those who elevated him to power." (Globe, p. 1755.) On April 5, 1866, Senator Reverdy Johnson, who sup-

ported the veto, again reviewed the *Dred Scott* case, noting that under that decision the Congress might be able to make a Negro a citizen of the United States but not a citizen of a State. (Globe, p. 1776.) Since this legislation related to rights inherent in State citizenship, it was an unconstitutional attempt to invade the powers reserved to the States. (Globe, pp. 1777, 1778.) For the most part, the few remaining Senate speeches were devoted to repetition of previous arguments or to general Reconstruction matters. (Globe, pp. 1781-1786; 1801-1809.) On April 6, the vote was taken, and the veto was overridden by 33 to 15. (Globe, p. 1809.) In the House, on April 9, 1866, there was no discussion at all. After some dilatory tactics by the opposition, Representative Wilson called the previous question, and the House overrode the veto by a vote of 122 to 41. (Globe, p. 1861.)

D. THE FOURTEENTH AMENDMENT

INTRODUCTORY NOTE

The legislative history of the Fourteenth Amendment itself is preceded by summaries of two other proposals for constitutional amendments introduced earlier in the first session of the Thirty-ninth Congress. These proposals were: a constitutional amendment reducing the congressional representation of any state which denied citizens suffrage on the basis of race or color (the Stevens "apportionment" amendment); and a constitutional amendment empowering Congress to enact legislation to guarantee equal rights to all persons (the Bingham "equal rights" amendment).

These proposals were the immediate precursors of sections one and two of the Fourteenth Amendment.

1. *The Stevens "Apportionment" Amendment*

On December 5, 1865, Representative Thaddeus Stevens introduced in the House a joint resolution proposing an amendment to the Constitution, providing for apportionment of representatives among the States on the basis of their respective legally-qualified voters. It was referred to the Judiciary Committee. (Congressional Globe, 39th Cong., 1st Sess., p. 10.)²¹

At the second meeting of the Joint Committee on Reconstruction, on January 9, 1866, Stevens submitted the same resolution to that body.²² On January 12, 1866, it was referred, along with other proposals, to a subcommittee consisting of Messrs. Fessenden, Stevens, Howard, Conkling and Bingham. (Committee Journal, pp. 9-10.) On January 20, 1866, the subcommittee reported, and, after further amendments, the Joint Committee approved, by vote of 13 to 1, the following proposed article of amendment:

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed; provided that whenever the elective fran-

²¹All references to the Congressional Globe in this section are to the 39th Congress, 1st Session.

²²Journal of the Joint Committee on Reconstruction, S. Doc. No. 711, 63d Cong., 3d Sess., p. 7, hereafter cited as "Committee Journal."

chise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation. (Committee Journal, p. 13.)

Representative Stevens introduced this proposed amendment, embodied in a joint resolution (H. J. Res. 51), on January 22, 1866. (Globe, p. 351.) He indicated that he wished to have it passed "before the sun goes down." However, after objections by Representatives Rogers of New Jersey and Chanler of New York indicating a minority view, Stevens agreed to postpone the vote, and debate commenced. (Globe, pp. 352-353.)

Representative Rogers, a member of the Joint Committee, presented the minority report of that body on the proposed amendment. He stated that the amendment contemplated a change in the fundamental principle that taxation and representation should always go together. Its object, he asserted, was to force Negro suffrage, in this indirect way, upon an unwilling population in order to prevent deprivation of its rightful representation. Whereas formerly, a state was entitled to three-fifths representation for its Negro slaves, now, under this amendment, the state would receive no representation at all for that class of population, if any kind of suffrage qualification were imposed on even one Negro. (Globe, pp. 353-356.)

Mr. Conkling, also on the Joint Committee, spoke in favor of the amendment. (Globe, p. 356.) He pointed out that the former slaves would now receive full representation under the

Constitution although not enfranchised at all. This would enable the Southern states to claim 28 more representatives in Congress. In effect, there would be, he said,

Twenty-eight votes, to be more or less controlled by those who once betrayed the Government, and for those so destitute, we are assured, of intelligent instinct as not to be fit for free agency. (Globe, p. 357.)

To remedy this situation, Conkling stated, the Committee had considered the possibility of a proposal to deprive the states of the power to disqualify or discriminate politically on account of race or color. However, this plan had been rejected because it trenched upon the principle of state sovereignty, denying to the people of the several states the right to regulate their own affairs in their own way. (Globe, p. 358.) The pending proposal had been adopted because it left every state free to extend or withhold the elective franchise on such terms as it pleased, and this without losing anything in representation if the terms were impartial as to all. But if any race "is so vile or worthless that to belong to it is alone cause of exclusion from political action, the race is not to be counted here in Congress." (*Ibid.*)

On January 23, 1866, Representative Blaine of Maine suggested that the amendment should be rephrased so that if Negroes were removed from the basis of representation, they should also be excluded from the basis of direct taxation. (Globe, p. 377.) Chanler of New York, reviewing the action of the Constitutional Convention on

this subject, remarked at the different spirit there prevailing:

All differences were compromised in a spirit of patriotism and justice. How different is all this from the hasty partisan legislation on this very suffrage question by the present Congress.

A caucus met before Congress organized and chalked out a line of policy and action for the Republican party on the floor of Congress. The whole matter of reconstruction was referred to a grinding committee, whose dictation should govern Congress in every measure brought before it for consideration. (Globe, p. 382.)

Representative Jenckes of Rhode Island objected to the amendment because an essential element of injustice was infused in it. By this express constitutional authorization,

We yield to States the power to exclude an entire race living among them, which has hitherto been a class by themselves, but who must now be counted as citizens. They may exclude not only that race, but people of other races who immigrate to this country, and thus contravene the long-settled policy upon which we open our ports to immigrants from all climes, and of all nations and races, and seek here to build up a nation which will not rest upon the basis of any narrow or clannish origin, but which will embrace the best blood of the whole human race. (Globe, p. 386.)

On January 24, 1866, Mr. Lawrence of Ohio expressed a desire that the Constitution be amended to apportion representation on the basis of citizens of the United States who were male

adult voters. (Globe, p. 404.) He believed that if any class

is unfit to be an element of political strength, it is unjust to clothe a favored class with political power on its behalf. Whatever protection it demands should be entrusted equally to all the Representatives of the people. (*Ibid.*)

Representative Shellabarger of Ohio objected to the amendment because it would be a declaration sanctioning the deprivation of political rights from a whole race of men, providing only that they be not represented in the government. As such, it would violate the basic principle of our government, require different constructions of other Constitutional clauses, and spoil the free spirit and sense of the Constitution. (Globe, p. 405.) Representative Kelley of Pennsylvania echoed this objection, and urged that the Congress follow

a rule of action which, if adhered to, will settle all our difficulties and establish the fact that there is on earth a Republic founded upon the imprescriptible rights of man, in which the humblest man, when he recounts his political rights, sets forth all that the strongest, the wisest, and the proudest may claim. Social inequalities there will be, and natural inequalities are ordained of God; but when our fathers gave us the Constitution they meant that within the wide limits of our country the measure of one man's political rights should ascertain the extent of those of every other man dwelling beneath that dome which is the fit canopy of a continent, the Constitution of the United States. (Globe, pp. 408-409.)

On January 25, 1866, Representative Bingham of Ohio expressed his belief that the proposed amendment was desirable, and reminded those who found various faults with it, that it was not the only amendment under consideration. Others would bolster this one, and remedy its defects. He informed the House that the Joint Committee

has under consideration another general amendment to the Constitution which looks to the grant of express power to the Congress of the United States to enforce in behalf of every citizen of every State and of every Territory in the Union the rights which were guarantied to him from the beginning,²³ but which guarantee has unhappily been disregarded by more than one State of this Union, defiantly disregarded, simply because of a want of power in Congress to enforce that guarantee. (Globe, p. 429.)

It was Bingham's belief that every slave when emancipated became a "free citizen" in the words of the old Articles of Confederation, and a "free person," a term which embraced all citizens, in the words of the Constitution. He thus became equal before the law with every other citizen of the United States. (Globe, p. 430.) Therefore, Bingham asserted,

I want the American people by adopting such amendments to declare their purpose to stand by the foundation principle of their own institutions, the absolute equality of all citizens of the United States politically and civilly before their own laws.

²³ Bingham was referring to his own "equal rights" amendment. See *infra*, p. 83.

That is the issue involved in the amendment presented by the committee. (Globe, p. 431.)

Congressman Raymond of New York, on January 29, 1866, spoke at length on the nature of the constitutional relation of the Southern states to the Union. (Globe, p. 483.) In the course of his remarks he stated that he "put no great faith in these so-called guarantees of the Constitution for objects which can only rest upon the public conscience and the public will." (Globe, p. 491.) Representative Julian of Indiana urged the adoption of an amendment which would directly prohibit the disfranchisement of anyone on account of race or color. (Globe, Appendix, pp. 56-58.)

On January 30, 1866, the joint resolution was recommitted without instructions to the Joint Committee on Reconstruction. (Globe, p. 508.) At a meeting of the Committee on the following day, Thaddeus Stevens moved to amend it by striking out the reference to direct taxes. This motion was agreed to, and in that amended form the joint resolution was ordered to be reported back to the House. (Committee Journal, pp. 15-16.)

Stevens reported the resolution to the House on the same day, January 31, 1866, and urged its passage. (Globe, p. 535.) The joint resolution was then passed by a vote of 120 to 46, more than the necessary two-thirds. (Globe, p. 538.)

Consideration of the joint resolution in the Senate began on February 6, 1866, with a speech in opposition by Senate Sumner. (Globe, p. 673.) He regarded it as "another Compromise of

Human Rights," introducing "discord and defilement" into the Constitution (*ibid.*), and a renunciation of all power under the Constitution to apply a remedy for a grievous wrong, when the remedy was available. (Globe, p. 674.) He felt that Congress had ample power to establish the right of suffrage for the Negro, even without any further constitutional amendment. Enfranchisement in his view was the complement to Emancipation, and was justifiable under the constitutional amendment which ordained the latter. (Globe, p. 675.)

But the Senate has already by solemn vote asserted this very jurisdiction. You have, sir, decreed that colored persons shall enjoy the same civil rights as white persons; in other words, that, with regard to civil rights, there shall be no Oligarchy, Aristocracy, Caste, or Monopoly, but that all should be equal before the law without distinction of color. And this great decree you have made as "appropriate legislation" under the Constitutional Amendment "to enforce" the abolition of slavery. Surely you have not erred in this act. Beyond all question the protection of colored persons in civil rights is essential to complete the abolition of slavery; but the protection of colored persons in political rights is not less essential; and the power is as ample in one case as in the other. (Globe, p. 684.)

Senator Fessenden, Chairman of the Joint Committee, opposed Sumner on February 7, 1866, arguing the necessity of the proposed apportionment amendment, although he admitted that he himself would prefer

a distinct proposition that all provisions in the constitution or laws of any State making any distinction in civil or political rights, or privileges, or immunities whatever, should be held unconstitutional, inoperative, and void, or words to that effect. (Globe, p. 704.)

But any such proposition was probably too extreme to secure the concurrence of the states. (*Ibid.*)

On February 14, 1866, Senator Clark of New Hampshire agreed that the real question was the guaranty of political rights—suffrage—for the Negro (Globe, p. 831), since enfranchisement was one of the basic rights of every free man. (Globe, p. 832.) A similar analysis was presented by Senator Yates of Illinois, on February 19, 1866. He stated that the rights granted by the Thirteenth Amendment included both the civil and political rights of every free man. (Globe, Appendix, p. 100–101.) By the Amendment, the Negro “became a part of the people” and, as such, “entitled to the same rights and privileges with all the other citizens of the United States.” (Globe, Appendix, p. 101.)

The vote on the joint resolution was taken on March 9, 1866. The constitutional amendment was defeated, for, although it received a majority vote of 25 to 22, it lacked the constitutional two-thirds. (Globe, p. 1289.)

2. The Bingham “Equal Rights” Amendment

On January 12, 1866, the Joint Committee on Reconstruction received two proposals for amend-

ment of the Constitution. (Committee Journal, p. 9.) The first, by Bingham, provided:

The Congress shall have power to make all laws necessary and proper to secure to all persons in every State within this Union equal protection in their rights of life, liberty, and property.

The second, by Thaddeus Stevens, Chairman of the House group of the Committee, was a simpler declaration:

All laws, State or national, shall operate impartially and equally on all persons without regard to race or color.

Both were referred to the subcommittee on the apportionment of representatives in Congress, which included both Bingham and Stevens. (*Ibid.*)

A week later, on January 20, 1866, the subcommittee reported a proposal which, although obviously patterned after Bingham's insofar as civil rights were concerned, also contained language to insure equal political rights, *i. e.*, suffrage:

Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty, and property. (Committee Journal, p. 12.)

This proposal was held in the Committee until after the apportionment proposal had passed the House, although the Committee continued to consider it actively. (Committee Journal, pp. 14-15.) After disagreement on the proposed termi-

nology, it was referred, on January 24, 1866, to a special subcommittee consisting of Bingham, Boutwell of Massachusetts, and Andrew Jackson Rogers of New Jersey. (Committee Journal, p. 14.) This subcommittee reported the proposal back on January 27, 1866, in a form more closely akin to Bingham's original proposal:

Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every State full protection in the enjoyment of life, liberty, and property; and to all citizens of the United States, in any State, the same immunities and also equal political rights and privileges. (Committee Journal, pp. 14-15.)

This form, however, did not meet with the Committee's entire approval (*ibid.*), so Bingham proposed a substitute on February 3, 1866:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, sec. 2); and to all persons in the several States equal protection in the rights of life, liberty, and property (5th amendment). (Committee Journal, p. 17.)

This was adopted by a narrow margin, and agreed on for report to Congress. (*Ibid.*)

The "equal rights" amendment proposal (H. J. Res. 63) was reported to the House on February 26, 1866. (Globe, pp. 813, 1033.) Bingham's report stated that the language of the proposal "stands in the very words of the Constitution." (Globe, p. 1034.) It was intended to remedy "the

want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution." (*Ibid.*) Had there been such a power in the Congress to enforce the privileges and immunities and due-process clauses, the "immortal bill of rights embodied in the Constitution," instead of resting them on the fidelity of the States, there would have been no rebellion. (*Ibid.*)

Representative Rogers of New Jersey answered that the addition of Congressional enforcement power to Article IV of the Constitution, such as proposed, would be the "embodiment of centralization" and the "disfranchisement" of "sacred and immutable State rights." (*Globe*, Appendix, p. 133.) If this amendment were necessary, Rogers asked, what authorized the enactment of the Civil Rights Act? (*Ibid.*) While he expressly favored the "protection, security, advancement, and improvement, physically and intellectually, of all classes," that end should be accomplished by State legislation:

Negroes should have the channels of education opened to them by the States, and by the States they should be protected in life, liberty, and property * * *. (*Globe*, Appendix, p. 134.)

They should be permitted by the States to do everything a white man could do, except to vote and hold office. (*Ibid.*) However, according to him, the proposed amendment would take from

the states the power to regulate such personal rights as education:

In the State of Pennsylvania there are laws which make a distinction with regard to the schooling of white children and the schooling of black children. It is provided that certain schools shall be designated and set apart for white children, and certain other schools designated and set apart for black children. Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all the people in the several States shall have equal protection in all the rights of life, liberty, and property, and all the privileges and immunities of citizens in the several States." (Globe, Appendix, p. 134.)

The proposed amendment would operate

under this broad principle of equality which during the last five years has been proclaimed throughout the land to empower the Federal Government to exercise an absolute, despotic, uncontrollable power of entering the domain of the States and saying to them, "Your State laws must be repealed wherever they do not give to the colored population of the country the same rights and privileges to which your white citizens are entitled." (Globe, Appendix, p. 135.)

On February 27, 1866, Representative Higby of California expressed himself in favor of Reconstruction and equality for the Negro, agreeing with Bingham that the purpose of the amendment was to supply a power of enforcement to provisions of the Constitution that lacked vitality

without it. (Globe, p. 1054.) Congressman Kelley of Pennsylvania felt that the existing provisions of the Constitution, guaranteeing the "privileges and immunities" of citizens, included a right to have a republican form of government; that is, one in which all citizens were equal. Therefore, he felt, the proposal was really unnecessary, although its adoption would serve to allay the doubts of the unreasonable. (Globe, pp. 1057-1059.)

Representative Hale of New York objected to the proposal for the reason that

it is in effect a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden, may be repealed or abolished, and the law of Congress established instead. (Globe, p. 1063.)

Thaddeus Stevens inquired rhetorically if Hale really meant that under the amendment, "Congress could interfere in any case where the legislation of a State was equal, impartial to all?" (*Ibid.*) Hale replied that the provision was not, as Stevens suggested, one

that when the States undertake to give protection which is unequal Congress may equalize it; it is a grant of power in general terms—a grant of the right to legislate for the protection of life, liberty, and property, simply qualified with the condition that it shall be equal legislation. (Globe, pp. 1063-1064.)

He maintained that the present Constitution offered ample safeguards. However, Bingham interrupted to inquire whether he knew of any de-

cision in which a person within a state had been able to sustain a suit for "vindication of a right or the redress of a wrong" when the organic law of that state forbade such a suit. (Globe, p. 1064.) Hale replied that not having briefed the question, he could not recall any such case. (*Ibid.*) Bingham also denied Hale's statement that the proposed amendment would apply only to the Negro in the South, for it was "to apply to other States also that have in their constitutions and laws to-day provisions in direct violation of every principle of our Constitution." (Globe, p. 1065.)

Representative Hale closed his remarks with a plea for the necessity of maintaining a reasonable balance between the national government and the states—asking

whether we ought not now to seek to strengthen the liberties of the States and the rights of the States as well as the liberties of the citizens. (Globe, p. 1065.)

On the following day, February 28, 1866, Representative Davis of New York also expressed concern over the upset of the federal-state balance. (Globe, p. 1083.) The Thirteenth Amendment, while freeing the Negro,

gives to Congress full power to enact all laws which shall be essential to their protection. They must be made equal before the law, and be permitted to enjoy life, liberty, and the pursuit of happiness. (Globe, p. 1085.)

The new proposal, however, would authorize Congress to legislate not merely to ensure equality of

protection but to set the measure of equality. (Globe, p. 1087.)

Mr. Bingham then took the floor again for his proposal. To him,

The proposition pending before the House is simply a proposition to arm the Congress * * * with the power to enforce the bill of rights as it stands in the Constitution today. (Globe, p. 1088.)

The proposal did not invade reserved State rights, for no State could claim to have reserved the authority to withhold privileges or impose burdens on a citizen contrary to the provisions of the Constitution. (Globe, p. 1089.) While he conceded the bill of rights was in terms only a limitation on national powers, it was nonetheless a recognition that the rights enumerated were a part of the rights of a citizen. (Globe, p. 1090.) If a State official denied rights therein declared, he invaded the privileges and immunities of a citizen and thereby violated his oath to uphold and preserve the Constitution. (Globe, p. 1094.) The Constitution, moreover, provided or declared:

that no man, no matter what his color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life or liberty or property without due process of law—law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice * * *. (*Ibid.*)

To make it possible that every man in the country would be secure in the "equal protection of his personal rights" through the medium of national law, the proposed amendment was required. (*Ibid.*) This end the amendment would reach, for by the term "equal protection" it would confer "upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons." (*Ibid.*)

Congressman Hotchkiss of New York expressed dissatisfaction with the measure because it did not accord sufficient protection for the equal rights of citizens. To him, the provision that Congress should guarantee the equality of protection would mean that the protection given would depend upon the caprice of a majority of the Congress. (*Globe*, p. 1095.) Equal protection should instead be made a

constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation. (*Ibid.*)

He expressed instead the desire that

the very privileges for which the gentleman is contending shall be secured to the citizens; but I want them secured by a constitutional amendment that legislation cannot override. (*Ibid.*)

At that point, a motion to postpone consideration was agreed to by a vote of 110 to 37. (*Globe*, p. 1095.) No further action was taken thereafter on this separate proposal.

3. *The Fourteenth Amendment*

On April 21, 1866, Thaddeus Stevens laid before the Joint Committee on Reconstruction an overall plan for reconstruction. (Committee Journal, p. 28.) He stated that the plan was not original with him, but was one which he would support. Included in the plan was a constitutional amendment, combining the principal proposals for amendment previously introduced. It contained a guarantee of civil rights and suffrage, and provisions for apportionment revision, repudiation of the Confederate debt, and congressional enforcement power.

Section 1 of the proposed amendment read:

No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude. (*Ibid.*)

Representative Bingham moved to amend this section by adding:

Nor shall any State deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation. (Committee Journal, p. 29.)

The committee rejected this amendment, and accepted the original language. (*Ibid.*) Later, Bingham obtained Committee approval of a new section, in addition to the section 1 already in the proposal, in these words:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (Committee Journal, p. 30.)

On April 25, this section was deleted from the proposal, but at the next meeting, on the 28th, it was voted back in to replace the original section 1. (Committee Journal, pp. 35, 39.) That same day, April 28, 1866, a final draft of the proposed amendment, containing Bingham's section 1, was adopted for formal report to both Houses. (Committee Journal, pp. 43, 44.) The proposal was received in both Houses on April 30, 1866, without written report, and, in the House, as H. J. Res. 127, it was made a special order for May 8. (Globe, pp. 2265, 2286.)

On that day, the discussion of section 1 commenced with some brief remarks by Stevens on behalf of the Joint Committee. He stated that the provisions of the section

are all asserted, in some form or another, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man

to testify in court shall allow the man of color to do the same. (Globe, p. 2459.)

He referred to state laws which imposed on Negroes disqualifications from testifying in courts, or imposed different methods of trial or different punishment, but said he would not "enumerate these partial and oppressive laws." (*Ibid.*) However,

Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen. (*Ibid.*)

Representative Stevens stated that he anticipated that objections would be made that the "civil rights bill secures the same things." (*Ibid.*) But that was only "partly true;" besides,

a law is repealable by a majority. * * * This amendment once adopted cannot be annulled without two thirds of Congress. That they will hardly get. (*Ibid.*)

Representative Finck of Ohio was opposed to the amendment, but his only remark about section 1 was that

if it is necessary to adopt it, in order to confer upon Congress power over the matters contained in it, then the civil rights bill, which the President vetoed, was passed without authority, and is clearly unconstitutional. (Globe, p. 2461.)

James A. Garfield of Ohio replied to Mr. Finck, as follows:

The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the

law whenever the sad moment arrives when that gentleman's party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. (Globe, p. 2462.)

The first section proposed to hold

over every American citizen, without regard to color, the protecting shield of law. (*Ibid.*)

Representative Thayer also stated that, while this section contained the "principle of the civil rights bill," it was included not because "that law cannot be sustained as constitutional," but to insure that

that provision so necessary for the equal administration of the law, so just in its operation, so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States. (Globe, p. 2465.)

The next day, May 9, 1866, Representative Broomall of Pennsylvania stated his impatience with those who believed that the civil rights bill was unconstitutional, but on "so vital a point I wish to make assurance doubly sure." (Globe, p. 2498.) Mr. Raymond of New York commented on the "somewhat curious history" of the "principle" of the first section, "which secures an equality of rights among all the citizens of the United States":

It was first embodied in a proposition introduced by the distinguished gentleman from Ohio [Mr. Bingham], in the form of an amendment to the Constitution, giving to Congress power to secure an absolute equality of civil rights in every State in the Union. It was discussed somewhat in that form, but encountering considerable opposition from both sides of the House, it was finally postponed, and is still pending. Next it came before us in the form of a bill, by which Congress proposed to exercise precisely the powers which that amendment was intended to confer, and to provide for enforcing against State tribunals the prohibitions against unequal legislation. (Globe, p. 2502.)

Even though the new proposal would amend the Constitution to confer on Congress the power to pass the bill he had twice voted against, he favored the proposal, for he was "heartily in favor of the main object which that bill was intended to secure." That object, he said, was to secure "an equality of rights to all citizens of the United States." All that he had sought was to have this done by constitutional means. (*Ibid.*)

Section 1 was briefly referred to by Representative Miller of Pennsylvania. In his view,

it is so just * * * and so clearly within the spirit of the Declaration of Independence of the 4th of July, 1776, that no member of this House can seriously object to it. (Globe, p. 2510.)

Representative Eliot of Massachusetts supported the first section "because the doctrine it declares is right," even as he had supported the civil rights bill; but while he was of the view that the bill

was amply authorized, he would gladly "incorporate into the Constitution provisions which will settle" any doubt on that question. (Globe, p. 2511.)

On the following day, May 10, 1866, the debate in the House was concluded. Representative Randall of Pennsylvania was the first speaker. Arguing in opposition to section 1, he claimed:

The first section proposes to make an equality in every respect between the two races, notwithstanding the policy of discrimination which has heretofore been exclusively exercised by the States, which in my judgment should remain and continue. They relate to matters appertaining to State citizenship, and there is no occasion whatever for the Federal power to be exercised between the two races at variance with the wishes of the people of the States. (Globe, p. 2530.)

Another Pennsylvanian, Representative Strouse, continued the opposition, inquiring what necessity there was at the present time that demanded the change which this Amendment called for:

I am answered that the necessity grows out of the war, that the South is vanquished, the negroes are liberated, and that therefore the organic law must be so amended that the emancipated slave shall in all respects be the equal of the white man. (Globe, p. 2531.)

Representative Rogers of New Jersey asserted that "the first section of this programme of disunion is the most dangerous to liberty." (Globe, p. 2538.) This section, he said,

is no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill which * * * was vetoed by the President of the United States upon the ground that it was a direct attempt to consolidate the power of the States and to take away from them the elementary principles which lie at their foundation. (*Ibid.*)

The breadth of the term "privileges and immunities" guaranteed by the first section would, he claimed, "prevent any State from refusing to allow anything to anybody." The whole purpose of this was the "negro again," but this "Government was made for white men and white women." (*Ibid.*)

Representative Farnsworth of Illinois, stated that most of the first section was harmless surplusage, except for the provision that no person should be denied the equal protection of the laws. (*Globe*, p. 2539.) As for that provision, was it not, he asked, "the very foundation of a republican government?" Enjoyment of equal rights of "life, liberty and the pursuit of happiness" required, he thought, the "equal protection of the laws." (*Ibid.*)

To Bingham, the necessity of the first section was "one of the lessons that have been taught * * * by the history of the past four years of terrific conflict." (*Globe*, p. 2542.) It would supply the want in the Constitution of a

power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never

even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State. (*Ibid.*)

This proposition would not involve taking any rights from the states, for

No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. (*Ibid.*)

Finally, he asserted, the section would satisfy the great want of the Constitution in protecting citizen and stranger, "protection by national law from unconstitutional state enactments." (Globe, p. 2543.)

After Stevens' final speech dealing generally with reconstruction, the vote was taken, and on May 10, 1866, the Amendment passed the House by a vote of 128 to 37, more than the necessary two-thirds. (Globe, p. 2545.)

In the Senate, the proposal was first brought up on May 23, 1866, nearly two weeks after the House action. (*Ibid.*, p. 2763.) Senator Howard of Michigan made the report for the Committee, in lieu of the Chairman, Senator Fessenden, who was unable to do so because of illness. (Globe, p. 2764.) Howard commented on section one in great detail, particularly with reference to the privileges and immunities of

United States citizenship. (Globe, p. 2765.) Among those privileges and immunities he included the rights enumerated in the Bill of Rights. Because they were expressed as limitations only on the Federal government, they could not, he said, be enforced formerly against the States by the national government. (*Ibid.*) With respect to the last two clauses of that section, he stated that they applied, not merely to citizens of the United States, but to "any person, whoever he may be"; and that

This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. (Globe, p. 2766.)

This would protect

the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. (*Ibid.*)

To Senator Howard, the first section was only a "restriction upon the States", and did not "confer any power upon Congress." The necessary enforcement power was derived from the fifth section of the proposal, giving Congress authority "to pass laws which are appropriate to the attainment of the great object of the amendment." These two sections were very important, he thought, for, if the amendment was adopted by the states, they would

forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their

jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government. Without this principle of equal justice to all men and equal protection under the shield of the law, there is no republican government and none that is really worth maintaining. (*Ibid.*)

The fifth section of the proposal, Howard repeated, would enable

Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment. (*Globe*, p. 2768.)

Senator Wade of Ohio followed Howard to propose an amendment. (*Globe*, 2768.) He commented upon the lack of any exact definition of the term "citizen of the United States." While he had "always believed that every person, of whatever race or color, who was born within the United States was a citizen of the United States," and felt that any real doubt on the subject had been settled by the civil rights bill, still

by the decisions of the courts there has been a doubt thrown over that subject; and if the Government should fall into the hands of those who are opposed to the views that some of us maintain, * * * they may construe the provision in such a way as we do not think it liable to construction at this

time, unless we fortify and make it very strong and clear. (*Ibid.*)

He therefore proposed to fortify section 1 by inserting in the first clause, in lieu of "citizens of the United States", the words "persons born in the United States or naturalized by the laws thereof." (*Ibid.*)

On May 24, 1866, Senator Stewart of Nevada spoke more generally on the proposal as a plan of reconstruction. (*Globe*, p. 2798.) However, he referred to the purposes of section one in his discussion of the principal point of difference between the Congress and the President. In his view, the President's restoration plan "ignored the rights and excluded from constitutional liberty four million loyal citizens guilty of no offense"—the freedmen. (*Ibid.*) The difficulty, as Stewart saw it, was that mere restoration of the Southern states would permit the people of those states to continue "to apply the theories of slavery to a condition of freedom," a dangerous evil; yet

They were educated to believe that a negro was a slave, possessing no rights that a white man was bound to respect, and they believed it still, and they are astonished at the inconsistencies of the world and its tendency to recognize the rights of man. (*Globe*, p. 2799.)

Senator Stewart said that Negro suffrage was the only final answer to "slavery and the inequality of human rights," rather than the guarantees afforded by the proposal. (*Ibid.*)

Following Senator Stewart's speech, further debate was postponed. (*Globe*, p. 2804.) Con-

sideration of the constitutional amendment was not resumed until five days later, on May 29, 1866. (Globe, p. 2868.) At that time Senator Howard offered various amendments to the proposal, as he stated, "after consultation with some of the friends of this measure." (Globe, p. 2869.) All but the enforcement section were to be amended. In section one the following declaration of citizenship was to be inserted as an opening sentence:

All persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside. (*Ibid.*)

On the following day, Senator Howard began the discussion on these new amendments. He asserted that the purpose of the first amendment, a "great desideratum," was to settle the "great question of citizenship" and to remove "all doubt as to what persons are or are not citizens of the United States." (Globe, p. 2890.) After objections from Senators Cowan of Pennsylvania and Doolittle of Wisconsin that this phraseology would include, within the group classified as citizens, Gypsies, Chinese and Indians not taxed (Globe, pp. 2890, 2892), the amendment to section 1 was agreed to without a roll call (Globe, p. 2897).

Consideration of section 1 was resumed on June 4, 1866. (Globe, p. 2938.) Senator Hendricks of Indiana called the proposed amendment a matter of party politics, a mere "party programme." (*Ibid.*) He thought it unthinkable that United States citizenship should be degraded by application to a "mixed population, made up of races that ought not to mingle." (Globe, p.

2939.) The whole proposal, in his view, was merely a centralization of "absolute and despotic power." (Globe, p. 2940.)

On the following day, June 5, 1866, Senator Luke Poland of Vermont spoke in favor of the proposal. (Globe, p. 2961.) He asserted that the privileges and immunities clause of section one of the proposal was largely a restatement of the provision in the original Constitution. The restatement was necessary, he said, because, "by and for the protection of the peculiar system of the South," there had been a "practical repudiation of the existing provision on this subject." (*Ibid.*) The war and the Thirteenth Amendment, however, made it "eminently proper and necessary that Congress should be invested "with enforcement powers with respect to this provision. (*Ibid.*) Poland thought that the remainder of section 1 was unobjectionable, for "the whole people of the nation stand upon the basis of freedom", and it was merely in keeping with the very spirit and inspiration of our system of government," as "declared in the Declaration of Independence." However, he said,

we know that State laws exist, and some of them of very recent enactment, in direct violation of these principles. Congress has already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at

the very foundation of all republican government if they be denied or violated by the States * * *. (*Ibid.*)

Senator Timothy Howe of Wisconsin, after stating the need for radical reconstruction policies, replied to Senator Hendricks' contention that state rights were invaded by the proposal. (*Globe*, Appendix, pp. 217, 219.) He felt that no state had a right to have "an appetite so diseased as seeks to abridge these privileges and these immunities, which seeks to deny to all classes of its citizens the protection of equal laws." (*Globe*, Appendix, p. 219.) It was a known fact, he asserted, that, except for federal authority, the Southern states would have "denied to a large portion of their respective populations the plainest and most necessary rights of citizenship," the right to own land, to collect wages by legal process, to appear in courts, to give testimony. (*Ibid.*) Most of these states had abandoned their attempts to deny these basic rights, but

these are not the only rights that can be denied; these are not the only particulars in which unequal laws can be imposed. (*Ibid.*)

He stated that he did not wish to delay the Senate by referring to more than a single instance of unequal laws—"a statute enacted by the Legislature of Florida for the education of her colored people." He asserted that this was reputedly the first Southern state to attempt the work of educating the children of her colored population:

And now, sir, I ask the attention of the Senate to the provision which that

Legislature made for the education of their colored population. They make provision for the education of their white children also, and everybody who has any property there is taxed for the education of the white children. Black and white are taxed alike for that purpose; but for the education of colored children a fund is raised only from colored men. It amounts to one dollar a head upon all colored males between the ages of twenty-one and fifty-five years. There were in 1860 between twelve thousand three hundred and twelve thousand four hundred colored males between the ages of twenty and fifty-five in Florida, so that that fund would yield about twelve thousand dollars dedicated to the work of educating the colored children of Florida—not a magnificent endowment, one would think. But how is it to be expended? First, there is to be a superintendent of colored schools for the State to be paid out of it, and he is to receive a salary of \$2000. That reduces it essentially. Next, there is to be an assistant superintendent of colored schools for each county at \$200 a year. There are in the State of Florida, I believe, thirty-nine counties, which would give \$7800 to the assistant superintendents. Add that to the salary of the State superintendent, and it takes \$9800 from the school fund to pay the superintendents, leaving \$2200 to pay the teachers. But the fund is not left quite so destitute as that; they require each one of the teachers to pay five dollars to the fund to get a license to teach. They are to be examined, their fitness ascertained, and if permission is given them to teach they are to pay five dollars, and that goes to the fund. That swells it; when that license is purchased they can set up a school.

Into that school, however, it is worthy of remark that no child can go without permission of the superintendent or his assistant, and no child can stay a day without the permission of the superintendent or his assistant, and the teacher who has paid five dollars for the permission to teach cannot hold that permission a day longer than the superintendent or assistant superintendent sees fit to allow, for the statute expressly authorizes the superintendent or assistant superintendent to vacate or annul the certificate whenever he shall see fit for incompetency or 'other good cause'—any cause which seems good to the superintendent or assistant superintendent." (Globe, Appendix, p. 219.)

Senator Howe then asked if, in view of this statute, touching "one of the great interests not only of this colored population but of the State itself," there could be any hesitation in putting into the Constitution a "positive inhibition upon exercising this power of local government to sanction such a crime as I have just portrayed." (*Ibid.*)

On June 7, 1866, when consideration of section 1 was resumed, Senator Garrett Davis of Kentucky stated that the majority were playing a "bold and desperate political game," (Globe, Appendix, p. 238), and that he was opposed not merely to the language of the proposal, but to the whole spirit and purpose of such an amendment. (*Ibid.*) As for the citizenship amendment to the first section, its

real and only object * * * is to make negroes citizens, to prop the civil rights bill, and give them a more plausible, if not a

valid, claim to its provisions, and to press them forward to a full community of civil and political rights with the white race, for which its authors are struggling and mean to continue to struggle. (Globe, Appendix, p. 240)

To Senator Davis, the "perpetual howl for justice and protection to 'the loyal citizens of African descent' * * *" was mere machinery of the radicals for "their continuance in office and power." (Globe, Appendix, p. 243.)

On June 8, 1866, the last day of the Senate debate, consideration of the proposed amendment commenced with a speech by Senator Henderson of Missouri. (Globe, p. 3031.) Speaking in favor of the proposal, he stated:

The South saw its opportunity and promptly collected together all the elements of prejudice and hatred against the negro for purposes of future party power. They denied him the right to hold real or personal property, excluded him from their courts as a witness, denied him the means of education, and forced upon him unequal burdens. Though nominally free, so far as discriminating legislation could make him so he was yet a slave. (Globe, p. 3034.)

The Southern argument that the Negro was "inferior to the white man" when it came into conflict with the "opposite idea of man's equality * * *, carrying with it equal rights and equal privileges" had been the cause of the war. (*Ibid.*) It was necessary therefore "to consider whether the cause of disease should be removed entirely or be left in the system to fester again." (*Ibid.*)

Henderson stated that section 1 of the proposed amendment, in its declaration of citizenship of the United States, and of the States as well, was really unnecessary to overrule the *Dred Scott* case. (Globe, p. 3032.) By the reasoning used in that case itself, the Thirteenth Amendment had made the freed slaves an indistinguishable part of the "people of the United States." (*Ibid.*) This section, however, in leaving "citizenship where it now is," made plain "what has been rendered doubtful by the past action of the Government." (Globe, p. 3031.) This being clear, he said, there was no further need to discuss the remaining parts of section one, "for they merely secure the rights that attach to citizenship in all free Governments." (*Ibid.*)

Senator Yates also stated that, under the Thirteenth Amendment, the Negro was a citizen already, for

that amendment did not confer freedom upon the slave, or upon anybody, without conferring upon him the muniments of freedom, the rights, franchises, privileges that appertain to an American citizen or to freedom, in the proper acceptation of that term. (Globe, p. 3037.)

By virtue of that amendment, the freed slave became "one of the people, one of the body-politic, and entitled to be protected in all his rights and privileges as one of the citizens of the United States." (*Ibid.*) Since the Negro was "like any other man, and not unlike him in any respect," he had "the same right, the same inherent, if you choose, God-given right * * *." (*Ibid.*)

Senator Yates referred to the possibility that adoption of the proposed amendment might conceivably be held to restrict the broad operation of the Thirteenth Amendment. He felt that the proposal should contain a declaration that it should not be construed to impair or in any wise affect the rights, privileges or franchise conferred by the Thirteenth Amendment. (Globe, p. 3037.) This was not propounded, he stated, from a belief that it was really necessary, but merely

so that there shall not be even a color for any judicial decision proposing to deprive men of rights which are already guaranteed by the recognized law. (*Ibid.*)

Senator Fessenden then moved to insert the phrase "or naturalized" in the first sentence of the first section, so that it should read: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside." The amendment was adopted. (Globe, p. 3040.)

After an attempt to have the sections of the proposal submitted as separate articles (Globe, p. 3040), and to strike out the privileges and immunities clause for vagueness (Globe, p. 3041), the final vote was taken. (Globe, p. 3042.) The amendment then passed the Senate, on June 8, 1866, by a vote of 33 to 11, more than the necessary two-thirds. (*Ibid.*)

In the House, the proposal was called up by Stevens on June 13, 1866. He pointed out that since the Senate amendments were slight, there was no purpose in discussing the proposal again at length. Therefore, he stated that he would

call the previous question at three o'clock. (Globe, p. 3144.) The brief discussion that ensued was without specific application to any particular part of the proposal. (Globe, pp. 3144-3148.) Finally, at three, the House concurred in the Senate amendments by a vote of 120 to 32, and the proposed Fourteenth Amendment was declared passed by the Thirty-ninth Congress. (Globe, p. 3149.)

E. THE READMISSION OF THE SOUTHERN STATES

The Reconstruction Act of March 2, 1867 (14 Stat. 428), set conditions upon the readmission of the Southern states (all of the Confederate states except Tennessee) to representation in Congress. The first sections provided for military government in these States. Section 5 provided:

* * * That when the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except such as may be disenfranchised for participation in the rebellion or for felony at common law, and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates, and when such constitution shall be ratified by a majority of the persons voting on the

question of ratification who are qualified as electors for delegates, and when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same, and when said State, by a vote of its legislature elected under said constitution shall have adopted the amendment to the Constitution of the United States proposed by the Thirty-Ninth Congress, and known as Article fourteen and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law, and then and thereafter the preceding sections of this act shall be inoperative in said State: *Provided*, That no person excluded from the privilege of holding office by said proposed amendment to the Constitution of the United States shall be eligible to election as a member of the convention to frame a constitution for any of said rebel States, nor shall any such person vote for members of such conventions.

In compliance with this Act and with supplementary acts of March 23, 1867 (15 Stat. 2), and July 19, 1867 (15 Stat. 14), constitutional conventions were elected in these states, constitutions drawn up and submitted to popular vote, legislatures elected which ratified the Fourteenth Amendment, and the constitutions submitted to Congress for examination and approval.

Two of these constitutions specifically provided for mixed schools (South Carolina, Art. X, sec. 10; Louisiana, Art. 135). The constitutions of

the other eight states were silent on the question, but all contained provisions making it the duty of the legislature to provide for education.

1. Congressional debates on the admission of the Southern states in 1868.

(a) *Alabama.* The first debates took place in 1868 in the Fortieth Congress, Second Session, on bills for the admission of Alabama. H. R. 904 was discussed in the House on March 11 (Congressional Globe, 40th Cong., 2d Sess., pp. 1818-28)²⁴ and March 17 (Globe, pp. 1934-38), and then recommitted to the Committee on Reconstruction.

The bill provided for the admission of Alabama "as one of the States of the United States" as soon as its legislature ratified the Fourteenth Amendment and "upon the following fundamental condition":

That the right of suffrage of citizens of the United States shall never be denied or abridged in said State on account of race, color, or previous condition of slavery; and Congress shall have power to annul any act of said State in violation or in derogation of the provisions of this act. (Globe, p. 1822.)

In debate, Representative Beck of Kentucky objected to the equal rights provision of the Alabama constitution, Article I, Sec. 2, providing

That all persons resident in this State, born in the United States or naturalized, or who shall have legally declared their intention to become citizens of the United States,

²⁴All references to the Congressional Globe in this section are to the 40th Congress, 2d Session.

are hereby declared citizens of the State of Alabama, possessing equal civil and political rights and public privileges.

He remarked that

No white man in Boston, Philadelphia, or New York, no Radical member of this House, would today consent to such a provision being incorporated into the constitution of the State in which he resides—that the hotels, the bedrooms, the dinner tables at which his wife and daughters were guests should be used and occupied by negroes of all grades indiscriminately with them * * * (Globe, p. 1824.)

Later, for himself and Representative Brooks of New York, he read a statement setting out eleven reasons why a majority of the Alabama electorate had not ratified the constitution, among them

7. Because it makes no provision for and does not make it the duty of the Legislature to appropriate the money raised by law for common schools, equally and separately, for the benefit of the white and black children in the State. (Globe, p. 1937.)

The bill was recommitted for consideration by the Committee on Reconstruction (Globe, p. 1938).

The Committee reported an amended bill as H. R. 970 on March 26 (Globe, p. 2138). In the debate on this bill, Representative Kelley, in arguing for the admission of Alabama, referred to the fact that its constitution provides “for the right of every freeman to hold land and enjoy common schools * * *” (Globe, p. 2141). Later, in objecting to various “scandalous provisions”

(Globe, p. 2197) in the constitution, Representative Kerr, of Indiana, called attention to its provisions for education:

Mr. Speaker, I next invite attention to the provisions of this remarkable instrument on the subject of taxation for the maintenance of schools. Now, I desire it to be distinctly understood that I and, so far as I know, every gentleman on this side of the House, entertain as sincere a devotion to the interests and advancement of education everywhere as any men in this country; but we want those interests so advanced, so promoted, as not to make them the very engines of tyranny for the oppression, demoralization, and destruction of social and civil government. This constitution provides for the levying of most onerous taxes for the support of education in the State of Alabama. Those taxes must be nearly all paid by the white men of Alabama. Yet every dollar (and I assert this without the fear of successful contradiction)—every dollar that shall be so raised will go to the education of the negroes of Alabama and to the support of radical officers connected with its expenditure, not to the support and education of white children. Why? Because by your fundamental law you make it a perpetual obligation upon the people of Alabama that they shall educate all their children in the same schools; that they shall practically amalgamate; that they shall educate the white children in debasing, personal association with the black children under the control of your Freedmen's Bureau and the agents of your military despotism, or such other machinery as shall succeed them. Yet we are told that this is a government "repub-

lican in form." These white men of Alabama, in order to maintain their self-respect, their manhood, the integrity of their blood and race, will be compelled from their own impoverished pockets to draw whatever they may for the education of their own people, independently of any provisions that may be made by the State under this constitution. Why did you not suffer your political allies in the convention of that State to secure to the negroes their just proportion, or one half, or even more, of the school fund, and give to the white men the balance, so that the races might be educated apart? Would it have been anti-republican to make so just an adjustment? It would have secured justice and equality to both races in the enjoyment of the school funds. The refusal to do it is a disgrace to the convention and to the Radical party, and an outrage upon the white people.

Then this constitution gives to what it calls a school board legislative power, making them a sort of *imperium in imperio*. They may make laws; they may enforce those laws, no matter how rigid, how cruel, how exacting they may be, they must be obeyed until by the Legislature of Alabama they may be repealed. (Globe, p. 2197.)

Further debate made no reference to this question. (Globe, pp. 2197-2217.) The bill passed the House on March 28 (Globe, p. 2217), but was indefinitely postponed by the Senate (Globe, p. 3266, June 18, 1868).

(b) *Arkansas*. H. R. 1039, to admit the State of Arkansas to representation in Congress, was reported from the Committee on Reconstruction on May 8, 1868 (Globe, p. 2390).

In opposition to the bill, Representative Beck, of Kentucky, questioned the validity of the popular vote ratifying the constitution, and also objected to its provisions:

Now, sir, I have not time to discuss the provisions of the constitution itself. Upon the question of education, upon the question of taxation, upon the power given to the commissioners appointed to control the election, and upon a variety of other questions, the constitution is, perhaps, the most objectionable that you ever saw. While they resolve in the ordinance attached to the constitution as follows:

"That this convention is utterly opposed to all amalgamation between the white and colored races, whether the same is legitimate or illegitimate.

"We would therefore recommend that the next General Assembly enact such laws as may effectually prevent the same;"

they require that the school fund, of perhaps \$1,000,000, shall be kept for schools to which blacks and whites shall go together, and it compels a white man, if he is unable to educate his children otherwise, to send to the negro schools their sons and daughters between the ages of five and eighteen years for at least three years. The constitution requires the Legislature to pass such laws as will compel them to go. Of course it will be a penal offense if they do not go. That part of the constitution reads thus:

"The General Assembly shall require by law that every child of sufficient mental and physical ability shall attend the public schools during the period between the ages of five and eighteen years for a term equivalent to three years, unless educated by other means."

Now, sir, I think this House, even now, after the previous question is seconded, in justice to itself, in justice to the truth of history, should postpone this matter and look into it, and I assert you will find the facts to be as I have stated them, and that there are in this constitution provisions more obnoxious than are contained in any other constitution that has been sent up from these southern States; provisions that no one can, with proper respect for himself, submit to as the fundamental law of the State in which he lives. (Globe, p. 2395.)

Representative Pile, of Missouri, asked to have read the Bill of Rights, the article on the subject of franchise, and the article on the subject of education. (Globe, p. 2397.) After they were read, he stated in support of the bill:

Mr. Speaker, I think, sir, that these provisions of this constitution are the best answer to the arguments against it. I only wish to say in addition that it is a little remarkable to find the gentlemen who have for two years been clamoring for the admission of the unreconstructed States and abusing this side of the House because we were unwilling to admit them to representation on this floor, on what was alleged to be purely partisan grounds, should now oppose their admission for the simple reason that their constitution secures equal rights to all men, and that their State governments are in the hands of loyal instead of disloyal men. (Globe, p. 2398.)

The debates in the House contained no other reference to education (Globe, pp. 2390-2399), and the bill was passed. (Globe, p. 2399.)

The bill was discussed in the Senate on May 13, and referred to the Judiciary Committee. (Globe, pp. 2436-2440.) It was reported back on May 16 (Globe, p. 2487), and debate began on May 27 (Globe, p. 2600).

Senator Drake, of Missouri, proposed in lieu of the House bill, an amendment whereby Arkansas should not be admitted until its legislature agreed to certain fundamental conditions, among them

that the third section of the first article of said constitution, in the words following, to wit: "The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege, or immunity, nor exempted from any burden or duty, on account of race, color, or previous condition," shall never be repealed or changed * * * (Globe, p. 2600.)

Later he modified the amendment to provide the "fundamental condition" of admission

that within the said State there shall be no denial of the elective franchise in all elections by the people or of any other rights to any person by reason of race or color, excepting Indians not taxed * * * (Globe, p. 2608.)

He modified this language slightly on the following day, May 28, to read:

that there shall never be in said State any denial or abridgment of the elective franchise or of any other right to any person by reason or on account of race or color, excepting Indians not taxed * * * (Globe, p. 2628.)

On May 30, Senator Henderson of Missouri announced that he was contemplating offering an amendment to the amendment of his colleague, Senator Drake:

Now, Mr. President, if the proposition of the Senator [Ferry] from Connecticut prevails [a proposal to strike out all the bill except that part that states that Arkansas be readmitted into the Union], I desire to offer an amendment to be incorporated into the bill upon which I am willing to stand and it is a provision which I think the Senate ought to be willing to make. I would strike out the condition of the bill and insert one I propose to offer. I differ with gentlemen when they say they would insert no provision for security. I think we ought to do so. But what ought we to require? Is it that every negro in the southern States shall vote, whether he is qualified to vote for all time to come? I think not. What shall we do? We should say that the suffrage of the negroes shall be on an equal term with the suffrage of the white men. If the white man is to be excluded for a certain cause, let the negro also be excluded for the same cause; let us not declare, as this provision declares, that every negro, because every negro in Arkansas is entitled to vote under this constitution, shall vote for all time to come. But put him upon terms of equality with the white man; that is going far enough; and let both black and white be excluded from the polls for the same reason, as, for example, for want of sufficient intelligence to vote or for pauperism. Having stricken out the condition in the

bill, I would insert a proposition of this character:

“Upon the fundamental condition that said State, in fixing the qualifications of electors therein, shall not be authorized to discriminate against any person on account of race, color, or previous condition; and also upon the further condition that no person on account of race or color shall be excluded from the benefit of education or be deprived of an equal share of the moneys or other funds created or used by public authority to promote education in said State.”

Without the second condition of course they could exclude the negroes from any of the benefits of education, and thereby lay a foundation and produce a reason for excluding them from the suffrage; but if both were adopted, of course they are put upon an equality with whites, in reference not only to education, but in reference to the suffrage. (Globe, 2700-1.)

On June 1, Senator Henderson offered his amendment. (Globe, p. 2748.) The following colloquy then ensued:

The PRESIDENT *pro tempore* put the question on the amendment to the amendment, and declared that the yeas appeared to have it.

Mr. HENDERSON. I call for the yeas and nays.

The yeas and nays were ordered.

Mr. FRELINGHUYSEN. I understand that all that is contained in this amendment of the Senator from Missouri [Mr. HENDER-

son] is contained in the fourteenth amendment of the Constitution.

Mr. HENDERSON. I understand not. To what provision in the fourteenth amendment does the Senator refer?

Mr. FRELINGHUYSEN. That there shall be no discrimination in civil rights on account of race or color; and the only thing we want to provide for now is to prevent that discrimination in political rights, and that the amendment of the Senator from Missouri does.

Mr. HENDERSON. The amendment of the Senator from Missouri does not refer to political rights at all.

Mr. FRELINGHUYSEN. I mean the amendment of your colleague [Mr. DRAKE].

Mr. HENDERSON. It says they shall not be denied any right.

Mr. FRELINGHUYSEN. The exercise of the elective franchise. That is a political right, I believe.

Mr. HENDERSON. I should like to have the amendment of my colleague read again.

The Chief Clerk again read the amendment of Mr. Drake, as follows:

That there shall never be in said State any denial or abridgment of the elective franchise, or of any other right, to any person by reason or on account of race or color, excepting Indians not taxed.

Mr. HENDERSON. "Any other right." It does not mean a political right. The language is, shall not be denied "the elective franchise or any other right." I think that includes civil rights. I should like to ask the Senator from New Jersey whether, upon the adoption of this amendment of my colleague, in his judgment the State is permitted to provide separate schools for

whites and blacks, or whether they must not be educated in the same schools?

Mr. FRELINGHUYSEN. I cannot answer that question, for I do not think that either the constitutional amendment or the proposition of the Senator's colleague touches that question, as to what school they shall be educated in; but I think that the amendment as proposed, as well as the constitutional amendment, prevents a discrimination in civil or political rights on account of race or color.

Mr. HENDERSON. Mr. President, I can state in a few words my view in offering this amendment. I desire that the negroes shall have an equal right in the school moneys, but that the State may require them to be educated in different schools from the whites. I propose that their rights shall be the same in the public funds, just as we have provided in the District of Columbia. Further, I do not desire to take away the right from the States to say who shall hold offices in the States. If they desire to say that the whites shall hold the offices, let them do so. I do not fear any provision of that sort ever being adopted in one of the States, provided this is a valid condition, because the negroes being entitled to the suffrage on equal terms with the whites, of course can protect themselves in that behalf. But I would not provide hereby a condition that the States should extend the same rights to the negroes in regard to office-holding, marrying, or anything else, that they do to the whites, and I think if we adopt a condition at all, we had better adopt it in the form in which I have presented it.

The PRESIDENT *pro tempore*. The question is on the amendment to the amendment, on which the yeas and nays have been ordered.

The question being taken by yeas and nays, resulted—yeas 5, nays 30 * * * . (Globe, p. 2748.)

Senator Drake's amendment was agreed to (Globe, p. 2748), and the bill was passed with the condition in that form (Globe, p. 2750).

A conference committee recommended that the Senate recede from its amendment to the House bill, and the report of the conference committee was concurred in. (Globe, pp. 2904, 2938; 15 Stat. 72.)

(c) The *omnibus bill*. On May 11, 1868, a bill (H. R. 1058) to admit North Carolina, South Carolina, Louisiana, Georgia, and Alabama to representation in Congress was reported from the Committee on Reconstruction. (Globe, p. 2412.) Debate began on May 13. (Globe, p. 2445.)

Representative Beck of Kentucky objected to the constitutions as drawn up by "men who had no substantial interest in the community * * * ." (Globe, p. 2447.) He said:

Take the case of South Carolina, for example, and I can only state a few prominent points. Of the men composing that constitutional convention seventy were negroes and about fifty white men. Of the men composing the present Legislature of that State seventy-one are colored and fifty-four white. One item of taxation alone in that State—the taxation for the support of free schools—amounts to \$1,000,000. It is provided that the white race shall never

have any public school exclusively for themselves; that the white and the black children, male and female, shall be playmates and schoolmates together; that if the white citizens do not send their boys and their girls to the schools attended by the negroes they shall suffer such penalties as a negro Legislature may see fit to impose. Who are the men thus imposing these conditions upon the people of that State? (*Ibid.*)

Later he discussed Louisiana:

Substantially the same provision in regard to education prevails there as in South Carolina. Taxation the most enormous, compulsory education of girls and boys at the same school with the negroes. They are all mixed together. A poor man cannot help himself. It is made a penal offense, or the Legislature has the power, and it is its duty to make it a penal offense, to refuse to allow them to associate together at the common schools. The man who is rich enough may employ a teacher of his own choice, and if he does so the compulsion ceases. But such has been the impoverishment at the South, as gentlemen well know, that few of the most intelligent and respectable people are really able to afford the means of education such as they used to afford, and they will therefore be compelled to send their children, whether they are willing to do so or not, to these mixed schools. I can scarcely conceive of a more despotic, galling, and degrading provision in the fundamental law of a State pretending to be free. (*Globe*, p. 2449.)

Representative Pruyn the next day made passing reference to this subject:

The brief time for which I am entitled to the floor does not permit me to enter into any examination of the provisions of the several constitutions. Indeed, no sufficient time has been afforded to us for that purpose, as they were only laid on our tables yesterday. The gentleman from Kentucky [Mr. Beck] called the attention of the House yesterday to several most objectionable provisions which some of them contained, especially as to the compulsory education of whites and blacks together. But I must leave this part of the subject, and content myself with referring to some historical facts connected with the origin of the reconstruction measures. (Globe, p. 2461.)

Representative Bromwell spoke in support of the bill, not disagreeing with this interpretation of the constitutional provisions:

The gentleman from New York [Mr. Brooks] has assailed these constitutions on account of the provisions they contain * * *. The next ground of complaint is that common schools are provided for in this constitution. That, of course, awakens a double measure of wrath in this Democratic orator * * *. (Globe, p. 2464.)

The bill was passed by the House on May 14. (Globe, p. 2465.)

The bill was reported from the Senate Committee on the Judiciary on June 2 as a substitute for S. R. 135. (Globe, p. 2759.) Debate began on

June 5. Senator Trumbull explained the form of the "fundamental condition:"

The first part of this fundamental condition is similar to the one which passed the House of Representatives in the Arkansas bill and which the Senate struck out and substituted for it an amendment offered by the Senator from Missouri [Mr. Drake] and the Committee have recommended the striking out of this fundamental condition and inserting the words contained in the amendment which was adopted by the Senate to the Arkansas bill with the exception of the words "or any other rights." These words which were in that amendment offered by the Senator from Missouri are omitted by the Judiciary Committee in reporting this bill, it being thought that there was no necessity for their insertion, and that it might lead to a misunderstanding as to what their true purport was. The citizens of these states are protected in all their civil rights independent of this bill; and it might lead to misconstruction or misapprehension as to what the words "any other right" meant. It might be construed by some persons as applying possibly to social rights, or rights in schools, which the Senator from Missouri did not intend; and as the Committee thought there was no importance in these words they are left out of the amendment. (Globe, p. 2858.)

The Committee on the Judiciary had amended the House bill to omit Alabama (Globe, p. 2858), but subsequently the Senate restored Alabama (Globe, p. 2965) and added Florida (Globe, p. 3018). The debates were concerned primarily

with the status of Alabama, the authority of Congress to impose conditions on admission, the propriety of insisting no negro suffrage, and a proviso relating to Georgia. (Globe, pp. 2895-2904, 2927-35, 2963-70, 2998-3029.) There were no further references to education.

The House agreed to the Senate amendments on June 12 (Globe, p. 3097) and the bill passed both houses on June 25 over the President's veto (Globe, pp. 3466, 3485). The Act (15 Stat. 73) contained no reference to equal rights or to education.

2. Congressional debates on the admission of Southern states in 1870

An Act of April 10, 1869 (16 Stat. 40), authorized the President to submit to popular vote in each state the constitutions of Virginia, Texas, and Mississippi, with power to submit portions to separate vote. After such vote and after ratification of the Fifteenth Amendment by these states Congress could approve the proceedings and restore the states.

(a) *Virginia*. On January 11, 1870, H. R. 783, to admit the State of Virginia to representation in Congress, was reported from the Committee on Reconstruction (Congressional Globe, 41st Cong., 2d Sess., p. 362).²⁵ It recited that "the people of Virginia have adopted a constitution republican in form, and by its provisions assuring the equality of right in all citizens of the United States before the law" and declared Virginia entitled to

²⁵All references to the Congressional Globe in this section are to the 41st Congress, 2d Session.

representation in Congress upon certain "fundamental conditions," including the following:

Second. That the constitution of said State shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote or hold office in said State who are entitled to vote or hold office by said constitution, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State, or to prevent any person on account of race, color, or previous condition of servitude from serving as a juror or participating equally in the school fund or school privileges provided for in said constitution: *Provided*, That any alteration of said constitution, equally applicable to all the voters of said State may be made with regard to the time and place of residence of said voters.

The reason for the inclusion of the condition on schools was explained by Representative Paine as follows:

I am about to give my reasons for supporting the Virginia bill presented by the Committee on Reconstruction with all its fundamental conditions. Why have we inserted in the bill the condition affecting the common schools? I will answer that question first.

The men who elected Governor Walker manifested during the canvass a most intense and bitter hostility to the common-school system and the system of county organization provided for in the new constitution of Virginia. These two systems

are intimately connected together. The fate of the school system hangs on the execution of the provisions relating to the county organization. A vigorous effort was made to induce the President to submit these provisions to a separate vote of the people. Of course the effort failed. It is hard for a northern man able to appreciate the benign influences of common schools upon the fortunes of a free Republic to contemplate this "chivalrous" hostility to the education of the people without unspeakable disgust. Governor Walker was supported and elected by the masses who stood in the ranks of the late rebellion. Outside of those ranks he had not, he has not now, a corporal's guard of supporters. He would have had no Republican votes at all but for a vague impression that the sympathies of the President were in that struggle opposed to the loyal people of Virginia. The Democratic Party abandoned Mr. Withers, the candidate of their choice, because they understood that Governor Walker, although a northern-born man, and a resident of a northern state, had opposed the Government during the Rebellion, and because in his speech at Liberty, in Bedford County, he had given them a pledge in these words, which I read from the address of their State Central Committee:

"If the Constitution expurgated shall be adopted, and you have elected your State ticket and your Legislature, you may proceed at once to propose such amendments to the Constitution as will clear it of all its dangerous characteristics. *The County Organization need never be enforced.* If I am elected with a Legislature not Radical it will never be put in operation."

* * * Mr. Speaker, Governor Walker must do one of two things; he must either nullify the county and school systems of Virginia, or he must cheat the people who elected him. * * *

Again, sir, it is admitted on all hands that at the present time colored men, although admitted to juries in the United States Court of Virginia by Chief Justice Chase have been excluded by local judges from all other juries in that State. I am at a loss to understand how the district commander could have permitted such a gross violation of the fourteenth Amendment of the Constitution of the United States. (Globe, pp. 402-3.)

Later Representative Palmer, in speaking of "the evidences of the present disloyal sentiment of the people of Virginia" (Globe, p. 442), referred to education:

More than this, it is known that the blacks in the States which have been reconstructed are voters, and they ought to be qualified by education to be intelligent voters. What is the spirit of the whites of Virginia toward the blacks in their midst on this subject of education? Sir, after the so-called Conservatives had accepted the aid of the blacks and had gone side by side with them to the polls, it would have been no more than decent on the part of the former to have extended every possible encouragement in the way of education to the latter. What have they done? They have not afforded a single dollar of aid for the establishment of common schools for either the blacks or the whites. On the other hand, you find that a military school in the city of Lexington, where the Federal flag is only

kept floating by Federal military force, and where the rebel youth of the South are taught to worship the memory of the "lost cause," receives the aid of an annual appropriation of \$15,000 for its support from the Virginia treasury. You will find that there is an annuity also from the public treasury for the support of the institution over which presides the head of the rebel army, Robert E. Lee. You will also find a public annuity, and a liberal one, for the support of the university at Charlottesville, all for the benefit of the men who are the ruling class, the rebels of Virginia; but not a dollar, not a farthing for the blacks of that state. (Globe, p. 442.)

Representative Ward referred to the conditions as "simple, just, patriotic" and as necessary to a republican form of government. (Globe, p. 485.) Representative Conger, of Michigan, defended the conditions, asking

Who desires to prevent any of the people of Virginia from enjoying the privileges of education as provided in this bill? Who would turn her children, of whatever condition, race, or color, away from her free schools, in the enjoyment of which they are guarantied by this bill? (Globe, p. 496.)

Representative Scofield, of Pennsylvania, spoke in support of the conditions:

Mr. Speaker, this new constitution of Virginia has very wisely provided for equal franchise and equal education in that Commonwealth * * * we admit the State with the qualification that it shall not go back upon those just provisions of its constitution immediately after its admission.

Now, what great harm is there in that? Is there any member of this House who at this time would say, if he was a member of a convention to frame that constitution that he would vote against putting in the constitution a provision in favor of equal education and equal franchise? It is a part and parcel of the policy of the Republican party adopted ever since after the war began.

* * * * *

Then the next question is reconstruction with us was to educate these blacks so that they could not be restored to slavery; to destroy all hope of the restoration of slavery, and therefore all hope of a separate government. We began first with the civil rights bill, then with the Freedmen's Bureau bill, and then with the fourteenth article of amendment, and now with the fifteenth article of amendment to the Constitution.

And then the people of Virginia, in pursuance of that same policy, have provided in their state constitution for the education and the franchise of the blacks.

* * * * *

I have been somewhat surprised, sir, to see the earnestness with which these fundamental conditions have been advocated and opposed. I do not regard them as of so much importance. I regard the first provision, enjoining upon them to keep up free education and free franchise, as merely advisory. It is an intimation that we look upon those features of their constitution as the features that make it republican in form, and that if they strike them out we will undertake to restore them in some way or other. (Globe, p. 500.)

Representative Bingham's substitute containing no conditions was adopted by the House (Globe, p. 502), and the bill was passed on January 14 in that form. (Globe, p. 503.)

On January 17, the Senate took up the House bill. (Globe, p. 512.) Debate on January 18 was largely on the question whether Governor Walker was against a public school system. (Globe, pp. 539-49.) On January 20, Senator Wilson offered as an amendment a condition

That the constitution of said State shall never be so amended or changed as * * * to prevent any person on account of race, color, or previous condition of servitude from serving as a juror, or participating equally in the school fund or school privileges provided for in said constitution.

This was rejected. (Globe, p. 597.) After two more days of debate (Globe, pp. 597-614, 634-43) Senator Wilson again offered an amendment

that the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State

which was accepted (Globe, p. 643), and as thus amended the bill was passed (Globe, p. 644).

After brief debate on January 24 (Globe, pp. 715-20) the House concurred in the Senate amendments. Representative Butler, from the Committee on Reconstruction, remarked that

* * * these amendments of the Senate contain the substance of our reconstruction acts. They contain the substance of the

thirteenth and fourteenth amendments to the Constitution of the United States. (*Globe*, p. 717.)

The act was approved on January 26 (16 Stat. 62).

(b) *Mississippi*. H. R. 1096, to admit the State of Mississippi to representation in Congress, was reported by Representative Butler from the Committee on Reconstruction on February 3, 1870. It contained the following condition, identical to that in the Virginia Act:

third, that the constitution of Mississippi shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said state. (*Globe*, p. 1013.)

The bill was passed immediately. (*Globe*, p. 1014.) It passed the Senate on February 17, after six days of debate. (*Globe*, p. 1366.)

As reported from the Senate Committee on the Judiciary, the bill contained no conditions (*Globe*, p. 1173), but the House conditions were accepted after prolonged debate. In so far as school rights were concerned, the debate did not turn on the Fourteenth Amendment, but in response to the question of Senator Thurman of Ohio

When did it become essential to a republican form of government that there should be public schools and that everybody should have an equal right in those schools? (*Globe*, p. 1218.)

Senator Howard of Michigan defended the condition:

Now, sir, if there be any one proposition more generally admitted than another

among American citizens, politicians, and statesmen, it is that in order to uphold and maintain a republican form of government such as is understood and practiced on this continent, the diffusion of knowledge by means of primary schools is the greatest, the safest, and the most effectual instrument. Now, if Congress see fit to incorporate in this act for the readmission of Mississippi that she shall never make any discrimination between the races, either in the application of the funds set apart for the enlightenment of the people on whom, and on whom solely, rest the ultimate responsibility and existence of government itself, * * * I am prepared for one to say that Congress are acting justly, constitutionally, and righteously in inserting this condition * * * (Globe, p. 1253.)

In answer to a question from Senator Norton of Minnesota, Senator Howard asserted

* * * that if my State should become so smitten with judicial blindness as to disregard those high principles of republican government which she has carried out since her birth as a State; * * * if she should so far forget her right and duty to the children of the State as to pervert the school fund, which belongs to them, from inuring to their benefit and confer all its benefits upon a privileged class, refusing to extend them to the mass of the people, I should be the first, sir, to appeal to the Congress of the United States to apply the corrective * * * (Globe, p. 1254.)

Senator Norton denied that Congress had any right to regulate the school system of Minnesota. (*Ibid.*)

Senator Morton of Indiana answered Senator Thurman's question by saying that "definitions advance," that "if we have now amended the Constitution so that its essential character is changed, that amendment operates upon the definition of a republican form of government as defined in the Constitution as fully as if it had been put there in the beginning." (Globe, p. 1254.) He referred to the three amendments and concluded

Then, to have a republican form of government now there must be no slavery, there must be equal civil rights, there must be protection to all, there must be no taking of life, liberty, or property without due process of law. (*Ibid.*)

Senator Carpenter disagreed. (Globe, p. 1323.) Senator Stewart of Nevada stated that

* * * if the State of Mississippi should pass a law which would deprive the colored man of the same rights and privileges of the schools that the white man has, or make any other discrimination which would deny him the equal protection and benefit of the laws, we have direct constitutional power to interfere; but I do not believe we can say in advance that she shall not change a particular provision of her constitution * * * (Globe, p. 1329.)

Further debate added little to these arguments. (Globe, pp. 1331-34, 1365.) The bill as received from the House was passed on February 17. (Globe, p. 1366; 16 Stat. 67.)

(c) *Texas*. The bill to admit Texas, H. R. 1536, containing the same condition, was reported to the House on March 15. (Globe, p. 1969.) It

was passed immediately. (Globe, p. 1970.) It was reported to the Senate and passed on March 29, without debate on this condition. (Globe, pp. 2271-72.) The House concurred in a Senate amendment not relevant to schools. (Globe, pp. 2291-94; 16 Stat. 80.)

(d) *Georgia*. A bill, H. R. 1335, to admit Georgia to representation contained the same conditions as the Virginia bill. (Globe, p. 1701.) Debate began in the House on March 4 and continued to March 8, when the bill was passed. (Globe, pp. 1701-07, 1708-23, 1743-51, 1765-71.) Georgia had previously been admitted in 1868, but had again been placed under military control because of the action of its legislature in expelling colored members. (Globe, pp. 1702-03; 16 Stat. 59.)

In the Senate the bill occupied fourteen days of debate between March 14 and April 19, without reference to the school provisions. (Globe, pp. 1924-30, 1950-61, 1986-96, 2018-26, 2055-68, 2088-93, 2388-2400, 2422-30, 2606-17, 2639-48, 2672-78, 2709-26, 2741-53, 2809-29.) On April 19, the Senate substituted for the House bill admitting Georgia an amendment keeping Georgia under military government. (Globe, pp. 2819, 2821, 2829.)

In the House on June 23, Representative Butler from the Committee on Reconstruction reported the bill in about the same form as originally proposed. (Globe, p. 4749.) He stated that he did not think the conditions important in view of the adoption of the Fifteenth Amendment (Globe, p. 4751), and so did not object to a proposed amendment by Representative Dawes which

omitted the conditions. Representative Lawrence of Ohio proposed an amendment to the latter amendment to insert the condition relating to school rights and privileges (*Globe*, p. 4752), which was not agreed to. (*Globe*, p. 4796.) The Dawes amendment was adopted, and the bill passed by the House on June 24 admitted Georgia without conditions. (*Globe*, p. 4797.) The bill reported from the Conference Committee and accepted by both houses on July 14 substantially followed the House version, without conditions. (*Globe*, pp. 5581, 5583, 5621; 16 Stat. 363.)

F. CIVIL RIGHTS ACT OF 1875

INTRODUCTORY NOTE

Whether or not a state should be permitted to segregate its public schools on a racial basis was considered by the Congress in connection with the legislation that became the Civil Rights Act of 1875, 18 Stat. 335. That consideration arose in connection with the Civil Rights bills offered by Senator Sumner and others during the years 1870-1875, bills that were considered in various forms in every session of every Congress between those dates. To simplify the history of that legislation, it is presented on a session-by-session basis.

41st Congress, 2d Session (Dec. 1869-July 1870)

Senator Sumner of Massachusetts introduced his Supplementary Civil Rights bill (S. 916) on May 13, 1870. (*Congressional Globe*, 41st Cong., 2d Sess., p. 3434.) It provided civil and criminal penalties for any refusal of equal rights "in railroads, steamboats, public conveyances, hotels, li-

censed theatres, houses of public entertainment, common schools, and institutions of learning authorized by law, church institutions, and cemetery associations incorporated by national or state authority; also on juries in courts, national and state." (*Ibid.*) Without discussion, this bill was referred to the Senate Judiciary Committee. (*Ibid.*) Three months later, it was reported adversely by Senator Trumbull, Chairman of the Judiciary Committee, and further consideration was indefinitely postponed. (*Id.*, p. 5314.)

41st Congress, 3d Session (Dec. 1870–March 1871)

Senator Sumner introduced an identical bill at the third session of the 41st Congress. (S. 1234, Congressional Globe, 41st Cong., 3d Sess., p. 619.) Like its predecessor, this bill was referred to the Senate Judiciary Committee, reported adversely by that Committee, and postponed. (*Id.*, p. 1263.)

42d Congress, 1st Session (March 1871–April 1871)

Shortly after the opening of the 42d Congress, Sumner reintroduced his civil rights bill (S. 99), and, as before, it was referred to the Judiciary Committee. (Globe, 42d Cong., 1st Sess., p. 832.) It was, however, never reported.

42d Congress, 2d Session (Dec. 1871–June 1872)

(1) *Senate*

The bill, S. 99, which Senator Sumner had introduced in the first session of the 42d Congress, came up for consideration in the second session of that Congress, twice as an amendment attached to amnesty legislation that had already passed the House, and once directly in an amended form.

(a) *The first Amnesty Bill.* The preceding session the House had passed a bill (H. R. 380) to remove political disabilities imposed under section 3 of the Fourteenth Amendment upon certain persons who had aided the Confederacy during the war. This bill came up for consideration in the Senate shortly after the opening of the second session of the 42d Congress in December 1871. (Congressional Globe, 42d Cong., 2d sess., p. 237.)²⁸ Senator Sumner almost immediately moved to amend the amnesty bill to add his supplementary civil rights bill to it. (Globe, p. 240.) After some discussion, Senator Frelinghuysen suggested certain amendments, among others, to permit churches, schools, cemeteries and institutions of learning, which had been privately established for the exclusive benefit of one race, to continue under the terms of their original establishment. (Globe, p. 435.) Sumner agreed to this modification (Globe, p. 453), and the Senate adopted his civil rights amendment, as thus modified, by a vote of 29 to 28. (Globe, p. 919.) However, when the bill itself as amended was put to a vote, it failed of the two-thirds majority required by section 3 of the Fourteenth Amendment, although a majority voted for passage. (Globe, p. 929.)

In the debate Senator Sumner stated that his civil rights bill was intended to enforce the principle of "equality before the Law" declared both by the Thirteenth and Fourteenth Amendments. To him, the term "separate but equal" was a contradiction and the separation of the races was an "indignity to the colored race" that

²⁸ Until further noted all references to the Congressional Globe are to the 42d Congress, 2d Session.

was "Slavery in its last appearance." (Globe, p. 383.) Particularly, he regarded separate schools as unequal:

The separate school wants the first requisite of the common school, inasmuch as it is not equally open to all; and since this is inconsistent with the declared rule of republican institutions, such a school is not republican in character. Therefore it is not a preparation for the duties of life. The child is not trained in the way he should go; for he is trained under the ban of inequality. How can he grow up to the stature of equal citizenship? He is pinched and dwarfed while the stigma of color is stamped upon him. This is plain oppression, which you, sir, would feel keenly were it directed against you or your child. Surely the race enslaved for generations has suffered enough without being compelled to bear this prolonged proscription. Will not the Republic, redeemed by most costly sacrifice, insist upon justice to the children of the land, making the common school the benign example of republican institutions where merit is the only ground of favor. (Globe, p. 384.)

To him, the Thirteenth, Fourteenth and Fifteenth Amendments had clearly established as a constitutional principle that

all persons without distinction of color shall be equal before the law. Show me, therefore, a legal institution, anything created or regulated by law, and I show you what must be opened equally to all without distinction of color. Notoriously, the hotel is a legal institution, originally established by the common law, subject to minute pro-

visions and regulations; notoriously, public conveyances are in the nature of common carriers subject to a law of their own; notoriously, schools are public institutions created and maintained by law; and now I simply insist that in the enjoyment of those institutions there shall be no exclusion on account of color. (Globe, p. 242.)

Senator Frelinghuysen agreed in principle with Sumner's views, but sought to amend his proposal to make it clear that schools and churches privately

established exclusively for either of the races, shall not be taken from their control, but remain devoted to their use. That provision modifies to some degree the law, but it does not affect the main subjects of the law, to wit, common carriers, innkeepers, schools, &c., but does perpetuate to the colored people their own institutions. (Globe, p. 435.)

As noted, Sumner consented to this exception of private schools. (Globe, p. 453.)

The general argument of the opponents of the bill was that it was unnecessary and an unconstitutional interference with state affairs. (*E. g.*, Senator Thurman of Ohio, Globe, p. 496.) But the special argument against the school provision, as made by Senator Thurman, the minority leader, was that the mere separation of races in school did not mean inequality:

All that can be claimed is this, that in regard to the schools supported by the public money, that money shall be so applied as that each citizen shall have an equal advantage from its application.

Therefore, preserving that equality, the State in the exercise of its power of regulation may apply a part of it to support a school for boys, a part of it to support a school for girls, a part of it to support a school for white children, a part of it to support a school for colored children. That is not denying them the equal protection of the laws in any sense whatsoever. * * * In no sense is it denying their equality before the law. (Globe, Appendix, pp. 26-27.)

Senator Hill of Georgia expressed the same general view:

Nor do I hold that if you have public schools, and you give all the advantages of education to one class as you do to another, but keep them separate and apart, there is any denial of a civil right in that. (Globe, p. 241.)

(b) *The second Amnesty Bill.* Meanwhile, the House had passed a slightly different form of amnesty legislation (H. R. 1050), and, when that bill was brought up for Senate consideration, in Committee of the Whole, on May 8, 1872, Senator Sumner moved to substitute his civil rights proposal in lieu of the amnesty provisions. (Globe, p. 3181.) After some discussion, Senator Ferry moved to amend Sumner's proposal to eliminate its prohibitions against racial segregation in public schools. (Globe, p. 3256.) This amendment was rejected. (Globe, p. 3263.) Senator Blair of Missouri offered an amendment to leave the question of mixed schools to the option of local school authorities. (Globe, p. 3258.) This amendment was also defeated. (Globe, p.

3262.) After several other amendments were considered, a vote was taken on Sumner's proposal to substitute his civil rights bill for the amnesty bill, and it was defeated. (Globe, p. 3268.) Immediately Senator Sumner moved to add his bill to the amnesty bill, and that proposal was adopted, the Vice President voting to break a tie. (*Ibid.*) The second amnesty bill, as thus amended, then received majority approval (32 to 22), but this was short of the necessary two-thirds for amnesty. (Globe, p. 3270.)

The debate added, to the points of view previously expressed in the consideration of the first amnesty bill, two thoughts. The first, expressed by Senator Trumbull, was that "the right to go to school is not a civil right and never was." (Globe, p. 3189.) Rather, he said, that was a "social right" and beyond proper regulation by the Federal government. (*Ibid.*) The second additional view was expressed by Senator Ferry of Connecticut. To him, so long as facilities given both races were equal, separation would not as a practical matter at that time violate any rights of either race. (Globe, p. 3190.) Separate schools would provide better educational facilities. He stated that mixed schools in the District of Columbia, for example, would "utterly destroy the school system" in the District, because

there are continually pouring into this District of Columbia colored laboring classes from Virginia, from Maryland, and from the surrounding country; the population of that class is increasing, as statistics show, with unparalleled rapidity every year; and their children, just emerged from the influences of slavery, naturally are felt by the

parents and guardians of those who have been long educated and cultured in schools as having a tendency, at any rate, to endanger those who are thrown into association with them in the common daily life of the common school. It may be true, or may be untrue, but the fact exists; and the tendency of compelling the two races to assemble in the same building is to drive out the very class of the community whom you wish to attach to your schools, by whom the schools are to be built up and fostered; whereas, what you need is to have the entire community interested in their support and preservation. (Globe, p. 3257.)

These views were taken up by Senators Edmunds and Morton. Senator Edmunds said:

* * * if there is anything in that equality of right under the law, if it be admitted or established that a public school is a part of governmental regulation, designed for the benefit of the whole people, then you cannot get out by saying that there is an equality of right when you declare that you will put the black sheep in one place and the white sheep in another. (Globe, p. 3190.)

Senator Morton answered Trumbull's contention, by stating

* * * that where schools are maintained and supported by money collected by taxation upon everybody, there is an equal right to participate in those schools. You may call it a civil right or a political right; and if there be a distinction, if a right to participate in these schools is to be governed by color or any other distinction, I say that is a fraud upon those who pay the taxes. (Globe, p. 3191.)

(c) *The Sumner Bill (S. 99)*. In the latter part of the session, Sumner's bill, which he had introduced in the preceding session, was taken up in his absence. (Globe, p. 3734.) It was amended to exclude reference to schools, among other things, and passed the Senate in that form. (Globe, p. 3736.) The Senate then reconsidered the second amnesty proposal. (*Ibid.*) Sumner, who was present by that time, again urged his bill as an amendment to the amnesty proposal, claiming that "without any notice" the Senate had adopted a civil rights bill "emasculated" by the removal of safeguards concerning schools and juries. (Globe, p. 3738.) He was unsuccessful in this attempt (*ibid.*) and Senator Conkling stated that this was because of the general view of the majority that the bill as passed was the "largest civil rights bill we can get." (Globe, p. 3738.)

(2) *The House*

A House bill (H. R. 1647) that was identical to Senator Sumner's could not be brought up for consideration because of the dilatory tactics of its opponents. (See Globe, pp. 1117, 1956, 2074.) Attempts to suspend the rules to bring up the bill gained majority approval, but not the two-thirds required to amend the rules. (Globe, pp. 1956, 3383.) Later, attempts were made to bring up the Sumner bill, in the amended form the Senate had adopted; again motions for suspension of the rules for that purpose failed to secure the necessary two-thirds. (Globe, pp. 3932, 4321-4322.) No further action was taken in the House during that session.

42d Congress 3d Session (Dec. 1872-March 1873)

During the third session of the 42d Congress, the Sumner bill (S. 99), as it passed the Senate in the form excluding reference to schools, was taken up by the House on March 3, 1873, and amended to add an amnesty proposal. (Congressional Globe, 42d Cong., 3d Sess., p. 2110.) However, although the bill received majority approval, it did not get the necessary two-thirds. (*Id.*, p. 2111.) No further action was taken.

43d Congress, 1st Session (Dec. 1873-June 1874)

(1) *Senate*

Senator Sumner's bill prohibiting school segregation, was the first bill introduced. (S. 1; 2 Cong. Rec. 2.) After brief discussion, it was referred to the Judiciary Committee, and reported favorably by that Committee April 14, 1874.²⁷ (2 Cong. Rec. 12, 3053.) In the form reported it contained a prohibition against segregation in public schools. (2 Cong. Rec. 3451.)

The bill was taken up by the Senate on April 29, 1874 (2 Cong. Rec. 3450), postponed for a period, and finally passed May 22, 1874, after an all-night session (2 Cong. Rec. 4176). During the course of its consideration, several amendments were offered with respect to schools. Senator Sargent of California sought an amendment specifically to permit "separate schools for persons of different sex or color, where such separate schools are equal in all respects * * *." This was defeated. (2 Cong. Rec. 4167.) An amendment

²⁷ Sumner died March 11, 1874.

proposed by Senator Gordon of Georgia to strike out all reference to schools was also defeated. (2 Cong. Rec. 4170.) On the other side, an amendment by Senator Boutwell to prohibit voluntary segregation in schools was also defeated. (2 Cong. Rec. 4170.) The bill, as passed, was substantially as introduced, with a prohibition against segregated schools. (2 Cong. Rec. 4175-4176.)

Senator Frelinghuysen, in reporting the bill, stated its purpose to be the removal of racial discriminations so as to give to all persons in the United States "the equal protection of the laws." With reference to public schools, he stated

The bill does not permit the exclusion of one from a public school on account of his nationality alone.

The object of the bill is to destroy, not to recognize, the distinctions of race. (2 Cong. Rec. 3452.)

This prohibition, he said, was authorized by "the thirteenth, fourteenth and fifteenth amendments, considered together and in connection with the contemporaneous history * * *." (2 Cong. Rec. 3453.)

Senator Pratt of Indiana stated that the bill would permit voluntary segregation, for "where the colored people are numerous enough to have separate schools of their own, they would probably prefer their children should be educated by themselves * * *." (2 Cong. Rec. 4082.) The minority leader, Senator Thurman of Ohio, replied:

* * * I know that the first section of the bill may to a careless reader seem ambiguous, but I do not think there is one member of the majority of the Judiciary Committee

who will not say, if the question is put directly to him, that the meaning of the section is that there shall be mixed schools. (2 Cong Rec. 4088.)

While the most of Senator Thurman's speech was directed toward the general objection that the bill as a whole exceeded Federal powers, he did voice the objection to the school provision on the grounds that not only was it like the rest of the bill, unconstitutional, but that it would destroy the public school system in the South. (2 Cong. Rec. 4089-4090.)

Senator Stockton of New Jersey, noting that the Republican caucus had agreed to pass the bill and that he was helpless to alter that decision, objected that Equality did not mean Identity. (2 Cong. Rec. 4145.) Senator Howe of Wisconsin spoke in favor of the bill. (2 Cong. Rec. 4147-4152.)

Senator Pease, of Mississippi, summed up the position of the bill's proponents:

Gentlemen say that if equal advantages in separate schools are provided the law is met so far as privileges and immunities are concerned. I say that whenever a State shall legislate that the races shall be separated, and that legislation is based upon color or race, there is a distinction made; it is a distinction the intent of which is to foster a concomitant of slavery and to degrade him. The colored man understands and appreciates his former condition; and when laws are passed that say that "because you are a black man you shall have a separate school," he looks upon that, and justly, as tending to degrade him. There is no equality in that. (2 Cong. Rec. 4154.)

Senator Cooper of Tennessee, opposing the bill, objected to applying it to his home state, for it would

upset the whole common-school system of the State of Tennessee, because the whites are in a decided majority in the State; the colored people are in a minority but a very large minority, forming a large part of the people. Now by this one act of legislation you sweep out of existence the whole common-school system of the State. Whom have you benefited? You have benefited no one. You have injured the colored man as well as the poorer classes of the white race—those who are dependent for the education of their children upon the common schools. You have stripped them of all opportunity to give to their children any education whatever. (2 Cong. Rec. 4155.)

After further general opposition, by Senators Kelly (2 Cong. Rec. 4163–4164) and Merrimon (2 Cong. Rec. 4164–4166), Senator Boutwell offered his amendment to make it clear that segregation was unlawful even if voluntary. (2 Cong. Rec. 4167.) Senator Stewart opposed this amendment on the ground of “expediency,” that the practical problem was “whether or not by this legislation you will aid to educate the colored man beyond what he would otherwise get.” (2 Cong. Rec. 4167.) He believed that it “ought to be left optional to have schools mixed or separate as the people themselves desire.” (*Ibid.*) Senator Frelinghuysen agreed. (2 Cong. Rec. 4168.) He particularly thought that the bill as drafted would permit such a “voluntary division” of races in the

public schools, although he was clear that segregation could not be enforced by law. (2 Cong. Rec. 3452.)

Senator Sargent, who sought a more explicit provision for segregated schools, gave his summary of the problem:

We ought to legislate here as statesmen, having in view not merely abstract ideas or theoretical principles or sublimated ideas, but to observe the condition of the times and know whether by any law which we may pass here we inflict an injury upon the country; whether we retard its prosperity; whether we overthrow its educational systems; whether we entail ignorance upon the coming generations; whether we destroy institutions which have proved their value, and which no man in his good senses, unbiased by bigotry, can deny are of inestimable value, ay, indispensable to the country. (2 Cong. Rec. 4172.)

His proposal was, however, rejected (2 Cong. Rec. 4175) and, as noted above, the bill passed the Senate with a provision against segregated schools.

(2) *House*

(a) *S. 1.* In the House, the Sumner bill (S. 1), after Senate passage, never formally came up for consideration during the remainder of the session. Attempts to bring it up were defeated. (2 Cong. Rec. 4242, 4439, 4691, 5162.) During one such attempt to suspend the rules to facilitate consideration of the bill, Representative Butler, Chairman of the House Judiciary Committee, accompanied a motion to suspend with a statement that the suspension would permit a test vote to be taken on the school clause; but the opposition refused to

agree to the rules suspension unless the school clause was stricken out. (2 Cong. Rec. 4439.)

(b) *H. R. 796*. A House bill identical to the Sumner bill, had been referred to the Judiciary Committee early in the session. (*H. R. 473*; 2 Cong. Rec. 97, 98.) The Judiciary Committee, however, introduced its own bill, *H. R. 796*, containing a prohibition against racial segregation in public schools maintained in whole or in part at public expense, or by "endowment for public use." (2 Cong. Rec. 318.) This bill came up for consideration December 19, 1873, at which time attempts were made to arrange speaking time in order to prevent a filibuster. (2 Cong. Rec. 337, 338.) At that time, several amendments were offered relating to the school clause: Representative Eldredge offered an amendment permitting "separate but equal" accommodations; Representatives Potter and Whitehead moved to strike out all reference to schools. (2 Cong. Rec. 339.) After several days of debate, the Chairman of the Judiciary Committee, Representative Butler, moved to recommit the bill for reconsideration of the question of "mixed schools." (2 Cong. Rec. 455-458.) The bill was not brought up again at this session.

Representative Mills of Texas stated that, if the school clause were passed, the Negro would be worse off than before, for

The Legislatures of every State where the white people have control will repeal the common-school laws. Who, then, will take him by the hand and lead him to the school-room and pay for his tuition? (2 Cong. Rec. 385.)

Representative Durham of Kentucky agreed with Mills:

I believe the passage of this bill will so embitter the white people of Kentucky that it will retard, rather than forward, the educational advantages of the blacks. I believe it will destroy our whole common-school system. (2 Cong. Rec. 406.)

Representative Blount of Georgia stated that enactment of the bill with the school clause would cause the white Southerners to withdraw support from the schools, so that

The common schools will be abandoned, and the only hope for the moral and intellectual elevation of the negro will sink below the horizon forever. (2 Cong. Rec. 411.)

In answer, Representative Lawrence of Ohio refused to discuss the "expediency" of the bill, for

It is always expedient to do right. Equality of civil and political rights, of all rights which exist under law, is simple justice. (2 Cong. Rec. 414.)

He supported the bill as drawn, since

The fourteenth amendment was designed to secure this equality of rights; and we have no discretion to say that we will not enforce its provisions. There is no question of discretion involved, except as to the means we may employ. (*Ibid.*)

However, others of the majority did desire to give careful consideration to the effect of the bill on schools. Thus, in moving for recommitment, Representative Butler stated that "this question of mixed schools should be very carefully considered." (2 Cong. Rec. 456.) To him, the fact that the

"negroes * * * have never, till the last few years, had any opportunity for education," and the probability that the current feelings as to the "difference in the races" would disappear "in the next generation", justified careful reconsideration and perhaps modification of the mixed school provision. (2 Cong. Rec. 456-457.)

43rd Congress, 2d Session (Dec. 1874-March 1875)

During the second session of the 43rd Congress, nearly all the relevant discussion and action occurred in the House. Attempts were there made to bring up the Sumner bill (S. 1), which had passed the Senate the previous session with a prohibition of segregated schools. (3 Cong. Rec. 704. See *supra*, p. 149.) These were defeated, and, except for subsequent unsuccessful attempts to substitute its text for the House bill, the Sumner bill was not acted upon. (3 Cong. Rec. 704, 938, 1010.)

The House bill (H. R. 796) which had been re-committed to the Judiciary Committee the previous session, *supra*, p. 153, was again reported to the House December 16, 1874. (3 Cong. Rec. 116.) However, as reported, it contained an amendment expressly approving the maintenance by a state of "separate schools * * * giving equal advantages in all respects, for different classes of persons * * *." (*Ibid.*)

Attempts to bring the bill up were unsuccessful because of the dilatory tactics of its opponents, who kept the House from action for one continuous session of over 46 hours by motions to adjourn. (3 Cong. Rec. 786-828.) After amendment of the House rules to prevent a recurrence

of this, the House bill was brought up for final consideration. (3 Cong. Rec. 890-902, 938.) After three days of debate, the bill was passed; but, just before passage, an amendment was adopted which struck from the bill all reference to schools, including the provision which permitted "separate but equal" facilities to be maintained. (3 Cong. Rec. 1010, 1011.) In that form, the Senate concurred, and the bill became law March 1, 1875, 18 Stat. 335.

The views expressed on the school issue on final House passage of the bill were mainly repetitive of those expressed in previous sessions. The floor leader for the bill, Representative Butler, stated that he had been given explicit instructions by his Committee:

As instructed by the Committee on the Judiciary, I propose to yield for a motion to substitute for this bill the provisions of the Senate bill on the same subject.²⁸ I am instructed by the committee then to yield to an amendment to be moved by the gentleman from Alabama [Mr. White]. I will then yield to a motion to amend the bill by striking out all relating to schools. I do this in order that all shades of republican opinion may be voted upon. (3 Cong. Rec. 938.)

The amendment striking out all reference to schools, the only one of the series which was successful, was offered by Representative Kellogg.

²⁸As has been noted, the Senate bill passed with a provision against segregated schools, while the House bill, as reported, contained an express provision for "separate but equal" schools.

(3 Cong. Rec. 939, 1010.) Mr. Kellogg explained the purpose of his proposal:

The amendment I have proposed is to strike out of the House bill reported by the Committee on the Judiciary all that part which relates to schools; and I do it, Mr. Speaker, in the interest of education, and especially in the interest of the education of the colored children of the Southern States. As the bill is now drawn, we recognize a distinction in color which we ought not to recognize by any legislation of the Congress of the United States. Sir, in the legislation of this country I recognize no distinction of color, race, or birthplace. All ought to be equal before the law; and the children of all should have an equal right to the best education they can have in the public schools of the country. But this bill proposes to make a distinction by a national law. The proviso to the first section is one that makes a discrimination as to classes of persons attending public schools; and I do not wish to make any such provision in an act of Congress.

But upon this school question we should be careful that we do not inflict upon the several States of the Union an injury that we ought to avoid. A school system in most of the Southern States has been established since the war of the rebellion, by which the colored children of the South have the advantages of an education that they never could have before that time. I believe, from all the information I can obtain, that you will destroy the schools in many of the Southern States if you insist upon this provision of the bill. You will destroy the work of the past ten years and leave them to the mercy of the unfriendly

legislation of the States where the party opposed to this bill is in power. And besides, this matter of schools is one of the subjects that must be recognized and controlled by State legislation. (3 Cong. Rec. 997.)

Representative Burrows of Michigan stated:

For the reasons I have urged and many others which might be mentioned I shall not under any consideration give my support to the separate school doctrine. Not only is it pernicious in itself, but it is the beginning of that class legislation which, if once entered upon, will know no end until it has brought to the weaker class of every race subjection and to the country only disaster and ruin. If you cannot legislate free schools, I prefer that the bill should be altogether silent upon the question until other times and other men can do the subject justice. (3 Cong. Rec. 1000.)

Representative Monroe of Ohio stated that the "separate but equal" clause in the bill would be a "dangerous precedent" for the reason that "it introduces formally into the statute law a discrimination" grounded on race. (3 Cong. Rec. 997.) This, he said, could seriously affect the future of the Negro, for

The representative men of the colored race tell me that they would rather have their people take their chances under the Constitution and its amendments; that they would rather fall back upon the original principles of constitutional law and take refuge under their shadow than to begin with this poor attempt to confer upon them the privilege of education connected with this discrimination. (*Ibid.*)

Rather than enact a provision explicitly approving racial segregation, Mr. Monroe stated that he understood the Negroes would

think their chances for good schools * * * better under the Constitution with the protection of the courts than under a bill containing such provisions as this. (3 Cong. Rec. 998.)

Representative Cain (a Negro) favored the proposed compromise, "for the sake of peace in the republican ranks, if for nothing else—not as a matter of principle—to except the school clause." (3 Cong. Rec. 957.) However, he could not agree to the "invidious discrimination in the laws of this country" involved in the "separate but equal" clause. (3 Cong. Rec. 981.)

The floor leader, Representative Butler, closed, as follows, with respect to the school provisions of the bill:

There are two kinds of opinion in the republican party on this question. I myself would legislate equal privileges to white and black in the schools, if I had the power, first, to legislate, and, secondly, to enforce the legislation. But the difficulty I find in that is, that there is such a degree of prejudice in the South that I am afraid that the public-school system, which has never yet obtained any special hold in the South, will be broken up if we put that provision into the bill. Then comes the provision of the committee that there shall be separate schools wherever schools are supported by taxation. There are some difficulties with an unwilling people in carrying out that provision, and there is an objection to it on the part of the colored

people, because they say they desire no legislation which shall establish any class distinction.

Then comes the proposition of my friend from Connecticut [Mr. Kellogg] to strike out all relating to schools. I should very much rather have all relating to schools struck out than have even the committee's provision for mixed schools. (3 Cong. Rec. 1005-1006.)

As noted, the Kellogg amendment was adopted, and the bill passed in that form. (3 Cong. Rec. 1010, 1011.)

II. THE STATE MATERIALS

INTRODUCTORY NOTE

This portion of the Appendix contains the historical materials concerning the relevant actions of the thirty-seven states to which the Fourteenth Amendment was submitted for ratification.

The materials are arranged alphabetically by states. A brief summary precedes the presentation of the detailed materials for each state. The ratification proceedings are set out first. Then follows a description of the school system in the state in the period immediately preceding and following ratification of the Amendment, and of the legal provisions relating to the status of Negroes. In most instances our research has not extended beyond the year 1880.

In addition to the constitutions, session laws and the reports of court decisions, we have consulted the following state records, all of which are available in the Library of Congress: (1) The printed House and Senate Journals of each state;

(2) the printed "Documents" submitted to the legislatures, which usually include the periodical reports of the state superintendent of schools; (3) the reports of legislative debates, which at the relevant period were published in only two states, viz. Pennsylvania (*verbatim* reports) and Indiana (summary reports); (4) the records of constitutional conventions which were held in the period immediately preceding or following the ratification of the Amendment. We have also examined the Microfilm Collection of Early State Records, prepared by the Library of Congress in association with the University of North Carolina, and collected and compiled under the direction of Professor William Sumner Jenkins.

ALABAMA

The Alabama Legislature rejected the Fourteenth Amendment in December, 1866. It ratified in July, 1868. The proceedings were perfunctory. On neither occasion was there any reference to the effect of the Amendment on school segregation. Prior to the Civil War there had been no public education for Negroes. The Constitution of 1867 provided for schools for all children; legislation approved in August, 1868, required separate schools for white and colored children.

RATIFICATION

The Alabama Legislature rejected the Fourteenth Amendment in 1866. In his message of November 12, 1866, Governor Patton recommended rejection. He objected to Section 1 of the Amendment because

It would enlarge the judicial powers of the General Government to such gigantic dimensions as would not only overshadow and weaken the authority and influence of the State courts, but might possibly reduce them to a complete nullity. It would give to the United States courts complete and unlimited jurisdiction over every conceivable case, however important, or however trivial, which could arise under the State laws. Every individual dissatisfied with the decision of a State court, might apply to a Federal tribunal for redress. * * * The granting of such an immense power as this over the State tribunals would, at the very best, subordinate them to a condition of comparative unimportance and insignificance, and might prove utterly destructive of that full security for the enjoyment of all the legal rights of property, and those effective guarantees against arbitrary oppression, which the people have found in our present judicial system, ever since the organization of the Government.²⁹

On December 6, 1866, Governor Patton made a contrary recommendation, declaring acceptance of the amendment to be a "necessity" in view of current congressional developments.³⁰ On December 7, 1866, the Senate, following the adverse report of its Committee on Federal Relations,³¹ rejected the amendment by a vote of 28 to 3.³² On the same day the House defeated a proposal to submit the ques-

²⁹ Senate Journal, 1866, pp. 32-33; House Journal, 1866, pp. 33-34.

³⁰ Senate Journal, 1866, p. 176.

³¹ Id., pp. 154-5.

³² Id., p. 183.

tion to popular vote,³³ and rejected the amendment by a vote of 69 to 8.³⁴

A year and a half later, on July 13, 1868, the Legislature ratified.³⁵ Ratification was perfunctory. In the House a resolution to ratify was introduced. The proceedings on the resolution were reported as follows:

When Mr. Reeves moved to lay the resolution on the table;

Lost.

The vote was taken on the passage of the resolution;

Which was adopted.³⁶

The vote was 67 to 4.³⁷ The Senate proceedings were as follows:

On motion of Mr. Foster the constitutional rule was suspended, and the joint resolution was read three times and passed forthwith—yeas 28, nays 0.³⁸

SCHOOLS

Prior to the Civil War there had been no public education for Negroes, and it was a criminal offense to attempt to teach a Negro, free or slave, to read or write.³⁹ In 1854 provision was made for a free public school system for "all the chil-

³³ House Journal, 1866, p. 210.

³⁴ House Journal, 1866, p. 213.

³⁵ Alabama Laws, 1868, p. 138.

³⁶ House Journal, Extra Session, 1868, p. 9.

³⁷ *Id.*, p. 10.

³⁸ Senate Journal, Extra Session, 1868, p. 10.

³⁹ Section 10 of "An Act to prevent the Introduction of Slaves into Alabama, and for other Purposes," approved January 16, 1832. Alabama Acts 1831, p. 16.

dren of our State.”⁴⁰ In view of the prohibition against instruction of Negroes this implied only white children.

The Alabama Constitution of 1865 made it the duty of the legislature to encourage schools:

The General Assembly shall, from time to time, enact necessary and proper laws for the encouragement of schools and the means of education * * *. [Art. IV, § 33]

The Constitution of 1867 was more detailed, saying in part:

It shall be the duty of the Board [of Education] to establish, throughout the State, in each township or other school-district which it may have created, one or more schools, at which all the children of the State between the ages of five and twenty-one years may attend free of charge. [Art. XI, § 6]

It also gave the Board of Education “legislative power in reference to the public educational institutions of the State,” subject to repeal by the General Assembly. Art. XI, § 5.

In the Constitutional Convention of 1867 proposals to require separate schools were defeated,⁴¹ as was a proposal to permit the legislature to provide for separate schools.⁴² One member protested the latter action as forbidding separate schools.⁴³

The Governor’s message of July 14, 1868, recommended that provision be made for education:

⁴⁰ Alabama Acts 1853-54, No. 6, p. 8.

⁴¹ Convention Journal, pp. 153, 237-8.

⁴² Convention Journal, p. 238.

⁴³ Convention Journal, p. 242.

A sound and thorough common school system is not only the great want but the only hope of the Commonwealth. We are far behind most of our sister States in this respect. Thirty-seven thousand and six hundred of the adult white population of Alabama in 1860 could not read and write, and the colored people are still more deficient in education. * * * With enlarged freedom and full opportunities for individual development should come the most ample facilities for obtaining that information that makes a man the peer of his fellows, and enables him to protect his own interests, at the same time that he is better fitted to discharge his duties as a citizen. We must see to it that every one in the State shall have an opportunity of acquiring an education. * * * It is true economy for the State to promote the education of all her children, for by no other investment will she so surely and so abundantly be repaid. * * *

It will be for the Board of Education to arrange the details of the school system, subject to your power of revision."

The Board of Education passed "An Act to provide separate schools," approved August 11, 1868:

Be it enacted by the Board of Education of the State of Alabama, That in no case shall it be lawful to unite in one school both colored and white children, unless it be by the unanimous consent of the parents and guardians of such children; but said trustees shall in all other cases provide separate

"Senate Journal, Extra Session, 1868, pp. 14-15.

schools for both white and colored children.⁴⁵

In 1875, the Constitution was amended to incorporate a requirement for separate schools:

The General Assembly shall establish, organize, and maintain a system of public schools throughout the State, for the equal benefit of the children thereof between the ages of seven and twenty-one years; but separate schools shall be provided for the children of citizens of African descent. (Art. XII, Sec. 1.)

ARKANSAS

Arkansas rejected the Fourteenth Amendment in December, 1866. The legislature objected on the ground that the Amendment gave Congress the power to define the rights of Negroes. In April, 1868 Arkansas ratified the Amendment. The proceedings were perfunctory. No mention was made of the effect of the Amendment on racial segregation in the public schools. Negroes were excluded from the public schools in 1867. The Constitution of 1868 provided public education for all children, without specifying whether schools should be mixed or separate. In the debates on this issue in the Constitutional Convention no reference was made to the Fourteenth Amendment. School legislation enacted in July 1868 provided for separate schools for the two races. School segregation continued thereafter. The Arkansas Civil Rights Act of 1873 called for equal educational accommodations and advantages for all children of school age.

⁴⁵ Alabama Laws 1868, p. 148.

RATIFICATION

The Arkansas Legislature in December, 1866, rejected the Fourteenth Amendment, in part because it construed the Amendment as giving Congress the power of "defining" the rights of the Negro. The House Committee on Federal Relations, reporting adversely on the amendment, stated:

The first section declares who are to be citizens of the United States and of the several States, taking from the latter a power not exercised by them, in determining who shall enjoy that political right. The negro is embraced, and the States prohibited from abridging his immunities as a citizen of the United States; which amendment Congress with authority to define what rights he shall enjoy, and, by legislative enactments, elevate him to a political equality with the white race. It also transfers to Congress jurisdiction of the local and internal affairs of the States, virtually destroying the independence of their courts, and centralizing their reserved power in the Federal Government * * *.

The fifth section would give Congress power to enforce the preceding provisions by appropriate legislation.

Under that clause the sovereignty of the States might be completely subverted, by divesting them of the rights now secured by the Constitution.

The amendment proposes changes to the fundamental law in direct antagonism with our system of government and upon terms dishonoring and degrading to the people of the Southern States."

* House Journal, 1866, pp. 288-289.

The House followed this recommendation, rejecting the Amendment by a vote of 62 to 2.⁴⁷

The Senate Committee on Federal Relations also reported adversely, saying in part:

The great and enormous power sought to be conferred on Congress, under the amendment, which gives that body authority to enforce by appropriate legislation the provisions of the first article of such amendment, in effect, takes from the States all control over all the people in their local and their domestic concerns, and virtually abolishes the States.⁴⁸

Its report was adopted by the Senate by a vote of 24 to 1.⁴⁹

In April, 1868, the Amendment was ratified by a unanimous vote in each house. Governor Murphy's message was of a perfunctory nature:

On the 16th day of last June, the Secretary of State of the United States transmitted to me an attested copy of an amendment of the Constitution, to become a 14th Article, on which the decision of the Legislature of this State was required. That attested copy was transmitted to the late Legislature, with the message, by whom the amendment was solemnly rejected. As the reconstruction laws require the ratification of this 14th Article before the State will be received and recognized as a State in the Union, it will be unnecessary for me to say more to the present Legislature, composed of loyal citizens of the State, than merely call their attention

⁴⁷ *Id.*, p. 291.

⁴⁸ Senate Journal, 1866-67, pp. 259-60.

⁴⁹ *Id.*, p. 262.

to the importance of early attention to the ratification of the same. In my last message, a true copy of the resolution and amendment will be found, to which I refer you.⁵⁰

The House ratified immediately, on April 3, by a unanimous vote. Senate approval, likewise unanimous, followed on April 6.⁵¹

SCHOOLS

The Arkansas Legislature in 1867 made provision for a system of common schools. These schools were for white children only and they were to be supported by a property tax on the property of white persons only.⁵² In an "Act to declare the rights of persons of African descent", the Legislature repealed all prior acts relating specifically to Negroes and mulattoes, except those concerning intermarriage, voting, jury service, and militia duty, but specified

That no negro or mulatto shall be admitted to attend any public school in this state, except such schools as may be established exclusively for colored persons.⁵³

The Constitution framed and adopted in 1868 assured educational opportunity for Negroes:

ARTICLE IX. Section 1. A general diffusion of knowledge and intelligence among all classes, being essential to the preservation

⁵⁰ Senate Journal, 1868, pp. 18-19; House Journal, 1868, p. 19.

⁵¹ House Journal, 1868, p. 22; Senate Journal, 1868, p. 24.

⁵² Arkansas Acts, 1866-67, No. 160, Secs. 1, 3, p. 413, March 18, 1867.

⁵³ Arkansas Acts, 1866-67, No. 35, Sec. 5, p. 100, February 6, 1867.

of the rights and liberties of the people; the general assembly shall establish and maintain a system of free schools, for the gratuitous instruction of all persons in this State, between the ages of five and twenty-one years, and the funds appropriated for the support of common schools shall be distributed to the several counties, in proportion to the number of children and youths therein between the ages of five and twenty-one years, in such manner as shall be prescribed by law, but no religious or other sect or sects shall ever have any exclusive right to, or control of any part of the school funds of this State.

It also guaranteed equality:

ARTICLE I. Sec. 3. The equality of all persons before the law is recognized and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege, or immunity, nor exempted from any burden or duty on account of race, color, or previous condition.

ARTICLE I. Sec. 18. The General Assembly shall not grant to any citizen or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens.

The Constitution did not specify whether the schools were to be mixed or separate. The debates in the Constitutional Convention are inconclusive. A Negro member of the Committee on Education was interested primarily in obtaining educational opportunities for members of his race, stating:

In real truth, their interests and ours are united. For their hopes of wealth, intelligence, and influence, for their power, both of those classes must depend on the

organic law of the State. If that organic law places within their reach the means of education for their children, the opportunities for the development of their intellect, the opportunity to "work their way up" in the world, they may soon come to take their place among the races of men, and among the leaders of their people.⁵⁴

To another member,

One of the provisions of this new Constitution which is submitted by the Committee, is, that the Legislature shall provide, by setting apart a sufficient amount of revenue of the State, for the education of the children of the State. Not black children—not white children—but *the children of this State* are to be provided for, so far as regards the attainment of an education.⁵⁵

Mr. Duvall objected to tax-supported free schools:

This Constitution, sir, proposes to tax me and my children to educate that race, while but few of them are to pay any taxes. I cannot support such a provision.

* * * * *

Mr. JOHNSON. You forget how long we worked for you, in a state of slavery, to give you the means by which you have been educated; and now we want to come upon a level with you.⁵⁶

Others construed the provision as requiring mixed schools and objected on that ground. A group of Democrats opposed the Constitution in part, on the ground that

⁵⁴ Convention Debates and Proceedings, p. 500.

⁵⁵ *Id.*, p. 649.

⁵⁶ *Id.*, p. 645.

It compels the white citizens of the State to contribute, by taxation, to the support of public schools from which their children will be effectually excluded.⁵⁷

Mr. Matthews was against the Constitution

because the common-school system it proposes, is an abomination to every white man true to the well-being of his race.⁵⁸

Mr. Bradley had similar sentiments:

* * * I ask you if you propose to thrust into the same common school with your child and mine, the children of the negro. Will you endorse that monstrous enactment which proposes to take advantage of the necessities of widows, and of poverty-stricken men, who cannot afford to send their children elsewhere, to compel them to thrust those children, for three months in the year, among the offspring of a race whom God, by writing an indelible mark upon their head and foot and brain, has pronounced the social inferiors of your sons and daughters? * * *⁵⁹

There was, however, no reference to the possible applicability or inapplicability of the Fourteenth Amendment to this problem.

The members of the Convention were aware of the applicability of the Amendment to other issues. The Convention adopted a resolution recommending that the next General Assembly enact laws to prevent intermarriage.⁶⁰ In debate

⁵⁷ *Id.*, p. 666.

⁵⁸ *Id.*, p. 672.

⁵⁹ *Id.*, p. 660.

⁶⁰ *Id.*, p. 828.

on this, it was pointed out that adoption of the Fourteenth Amendment

is a part of the condition precedent to our admission into the Union. Congress will reject any constitution, containing such a provision. Congress has virtually declared that we must allow all men the free exercise of their rights.⁶¹

A member asserted that a prohibition on intermarriage would

come in conflict with the Constitution of the United States, with the spirit of the age, and the rights of humanity * * *.⁶²

It was also argued that the prohibition on intermarriage would violate the privileges and immunities clause of Article IV, Section 2, of the Federal Constitution and also the Fourteenth Amendment.⁶³

On the other hand, a proponent of the resolution argued for its adoption lest similar provisions in the State Bill of Rights be construed as prohibiting laws against intermarriage:

There is no limitation and distinction, there is no fixed, determined meaning, to "civil rights," and "equality before the law;" and so long as these terms stand undefined and uninterpreted, so long will this remain a vexed question for future generations to fight and war over * * *.⁶⁴

Later, on the question of suffrage, there was a reference to the fact that

⁶¹ *Id.*, p. 377.

⁶² *Id.*, p. 499.

⁶³ *Id.*, pp. 502-4.

⁶⁴ *Id.*, p. 370.

It was well understood in the late election, that the only need of a Convention was to frame a Constitution in conformance with the requirements of the Reconstruction Acts.*

Governor Clayton, in his message to the legislature in 1868, described the situation of public education in Arkansas and asked for its improvement:

The wicked and shameful manner in which the servants of the people have neglected their educational interests, and appropriated to their own selfish uses and the unhallowed purposes of treason, the magnificent endowments of a generous government, subjects them to the merited condemnation of all true patriots. In regard to the advancement of the common school interests the question heretofore seems to have been, not how to do it, but how not to do it. * * * In 1860, as shown by the message above referred to, but 25 common schools were organized and kept up in this State from the common school fund. I am unable to give you correct information of the number of common schools now in operation, but for practical purposes it would be safe to proceed as though there were none.

From reliable statistics obtained from the lists of registered voters, made last fall, it is shown that thirty per centum of the white, and fifty per centum of the entire voting population were unable to write their own names. Nothing but a due sense of my constitutional obligations, and an earnest desire to promote the educational

* *Id.*, pp. 618-19.

interests of the State, induces me to make this shameful disclosure.

* * * *

The framers of our present Constitution have placed themselves in enviable comparison with past legislators, and merited the approbation and gratitude of posterity by the one act of far-seeing statesmanship which secures to future generations the inestimable boon of education, and gives life and perpetuity to the State, by providing the means whereby its future supporters and defenders may be prepared for the proper exercise of the duties of American citizenship.

* * * *

The present condition of our school interests is unprecedented. A large portion of the community are known to be antagonistic to the principles of universal education. The prejudices which exist against a certain class of the people will tend to embarrass the situation. Obstacles will doubtless be thrown in the way where active support should be given.⁶⁶

The legislature in 1868 construed the constitutional provision as permitting separate schools. "The Act to Establish and Maintain a System of Free Common Schools for the State of Arkansas," enacted July 23, 1868, provided with reference to the Board of Education:

That the said Board [shall] make the necessary provisions for establishing separate schools for white and colored children and youths, [] and shall adopt such other measures as they judge expedient for

⁶⁶ House J., 1868, pp. 297-99.

carrying the Free Common School system into effectual and uniform operation throughout the State, and providing as nearly as possible for the education of every youth. * * * ⁶⁷

In 1871 the progress of this school system was reported by the Superintendent of Public Instruction:

The organization of a system of Free Schools, for the universal education of the people, is an important era in the history of Arkansas. The great lack of education among the masses, even of the white population of the State, had long been felt among the intelligent classes to be a great evil and a serious hindrance to the upbuilding of the material, social and moral interests of the commonwealth.

And when, by operation of the laws of Congress, the colored race were made free and endowed with the rights of citizenship, the proportion of the population having a right to participate in civil affairs, and who could not read and write, was greatly increased. Hence the establishment of a system of schools which proffers educational facilities to all classes, without respect to color, must be hailed by all right-thinking persons as marking an epoch in our history of more than ordinary importance.

* * * * *

The condition of the country, as all know, was not the most favorable for carrying forward an enterprise, one of the prominent features of which was directly at variance with the preconceived notions and opinions of the great body of the people—namely,

⁶⁷Arkansas Acts, 1868, No. 52, Sec. 107, p. 163, July 23, 1868.

the education and elevation of the colored race. Much prejudice and ignorance of the system had to be met and overcome before a hearty cooperation of the people could be secured in furtherance of its aims and its objects, and without such cooperation the system must prove a failure.

The nature and provisions of the school law had to be explained, and the people convinced that the education of all the children would promote the best interests of the community, and all this required time and a vast amount of labor.⁶⁸

The segregation provision of the law of 1868 was repeated in the comprehensive revision of the school law by the 1873 legislature.⁶⁹ The same legislature enacted a Civil Rights Act which imposed penalties for failure "to provide equal and like accommodations, and advantages for the education of each and every youth of school age."⁷⁰

CALIFORNIA

California did not take any final action on the Fourteenth Amendment.

The California school laws of 1866 and 1870 excluded colored children from the existing public schools but authorized separate public schools for them. In 1874 the California Supreme Court held that racially segregated schools did not violate the "equal protection" clause of the Fourteenth Amendment. *Ward v. Flood*, 48 Cal. 36. Separate schools were abolished in 1880.

⁶⁸Ark. Docs., 1871, First Report, Sup't of Public Instruction, pp. 5, 8.

⁶⁹Arkansas Acts, 1873, No. 130, Sec. 108, p. 392.

⁷⁰Arkansas Acts, 1873, No. 12, Sec. 6, p. 15.

At the time the Fourteenth Amendment was before the legislature, Negroes were not permitted to vote, sit on juries, or intermarry with whites, but they were qualified as witnesses in court.

RATIFICATION

California did not take any final action on the Fourteenth Amendment. The Governor's message on December 2, 1867, recommended ratification. It commented on Section 1 as follows:

By the first section it is provided that all persons born or naturalized in the United States, and subject to its jurisdiction, are citizens of the United States and of the State wherein they reside, and States are prohibited from abridging the privileges and immunities of citizens, or of depriving them of life, liberty, or property, without due process of law. This section declares "equality before the law" for all citizens, in the solemn and binding form of a constitutional amendment, to which no reasonable objection can be urged.⁷¹

The Committee on Federal Relations of the Senate reported in its favor,⁷² while the Committee in the Assembly advised against the proposal (March 4, 1868),⁷³ neither specifying the reasons for their recommendations. No vote was taken.

⁷¹ Assembly J., 1867-68, p. 52.

⁷² Sen. J., 1867-68, p. 676.

⁷³ Assembly J., 1867-68, p. 611.

SCHOOLS

The Constitution of 1849 provided for a system of free common schools,⁷⁴ which was established in 1851. The school laws of 1851⁷⁵ and 1852⁷⁶ were silent as to segregation of colored and white children, and provided for apportionment of school funds among the districts according to the total number of children. In 1860, there were only 382 Negro children in the State between the ages of five and fifteen, and most of these appear up to that time to have attended the common schools, although separate schools for Negroes existed in San Francisco and Sacramento. The State Superintendent of Schools in his Report to the Legislature in 1859 strongly criticized mixing the races and urged the establishment of separate schools throughout the state. He instructed the school officials that in the meantime the common schools then established were clearly intended for white children.⁷⁷ In 1863, the establishment of separate schools with public funds was permitted.⁷⁸

In 1866 a law was passed providing for the establishment of racially segregated schools.⁷⁹

In his message to the Legislature, dated December 2, 1867, the Governor discussed the "common schools" as follows:

⁷⁴Art. IX, § 3.

⁷⁵Cal. Laws, 1851, c. 126, p. 491.

⁷⁶Cal. Laws, 1852, c. 53.

⁷⁷Sen. J., 1859, App., p. 14; Ferrier, *Ninety Years of Education in California*, 1846-1936, pp. 97 *et seq.*

⁷⁸Cal. Laws, 1863, c. 159, § 68.

⁷⁹Cal. Laws, 1866, c. 342.

The school law now on our statute books, is believed to be well adapted to the wants of the State and I trust that no attempt to repeal or modify it, in any essential particular, will be made * * *.⁸⁰

The Superintendent of Public Instruction reported that in the school year 1866-67 there were 16 schools for Negro children, with a total of 400 pupils, and that there were no instances where they had been admitted to white schools under Section 58 of the Law of 1866.⁸¹

The School Law of 1870⁸² was similar to that of 1866 in requiring separate schools for "children of African descent." It also provided that

The same laws, rules and regulations, which apply to schools for white children, shall apply to schools for colored (Sec. 57).

In *Ward v. Flood*, 48 Cal. 36 (1874), this statute was held not to violate the Fourteenth Amendment. With regard to the "equal protection" clause, the court stated:

* * * The public law of the State—both the Constitution and Statute—having established public schools for educational purposes, to be maintained by public authority and at public expense, the youth of the State are thereby become *pro hac vice* the wards of the State, and under the operations of the constitutional amendment referred to, equally entitled to be educated at the public expense. It would, therefore, not be competent to the Legis-

⁸⁰ Assembly J., 1867-68, p. 45.

⁸¹ Senate and Assembly J., 1867-68, Appendix 2, p. 22.

⁸² Cal. Laws, 1869-70, c. 556.

lature, while providing a system of education for the youth of the State, to exclude the petitioner and those of her race from its benefits, merely because of their African descent, and to have so excluded her would have been to deny to her the equal protection of the laws within the intent and meaning of the Constitution (p. 51).

But the 1870 statute was not of an exclusionary nature:

* * * the policy of separation of the races for educational purposes is adopted by the legislative department, and it is in this mere policy that the counsel for the petitioner professes to discern "an odious distinction of caste, founded on a deep-rooted prejudice in the public opinion." But it is hardly necessary to remind counsel that we cannot deal here with such matters, and that our duties lie wholly within the much narrower range of determining whether this statute, in whatever motive it originated, denies to the petitioner, in a constitutional sense, the equal protection of the laws; and in the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than of the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense (p. 52).

Following this decision, the school law was amended in 1874 to provide that while separate schools might be maintained, colored and Indian

children were entitled, in the absence of such a system, to enter any public school.⁸³

In 1880, those sections of the Code providing for the establishment of separate schools were repealed.⁸⁴ The Supreme Court in *Wysinger v. Crookshank*, 82 Cal. 588 (1890), held that because of the repeal of the statutory authority for segregation, separate schools could not be maintained.

LEGAL STATUS OF NEGROES

At the time the Fourteenth Amendment was considered by the California legislature, the Negro, in addition to being excluded from white schools, was not permitted to vote,⁸⁵ sit on a jury,⁸⁶ or intermarry with whites.⁸⁷ Prior to 1863, he had been disqualified as a witness in cases involving a white person, but in that year this restriction was removed, although continued with respect to Indians, Mongolians and Chinese.⁸⁸

CONNECTICUT

Connecticut ratified the Fourteenth Amendment in June, 1866. The state had never had racial distinctions in its school legislation. A law enacted in 1868 affirmed the right of every child to be admitted to any public school in the district of his residence.

⁸³ Cal., Amendments to the Code, 1873-74, p. 97.

⁸⁴ Cal., Amendments to the Code, 1880, c. 44, sec. 62.

⁸⁵ Cal., Const., 1849, Art. II, sec. 1; Gen. Laws, 1850-1864, ¶ 2431.

⁸⁶ *Id.*, ¶ 3870, sec. 1.

⁸⁷ *Id.*, ¶ 4462.

⁸⁸ *Id.*, ¶ 5332.

RATIFICATION

Connecticut was the first state to act on the Fourteenth Amendment. Governor Buckingham in his message of June 19, 1866, recommended ratification;⁸⁹ the Senate voted favorably on June 25, 1866;⁹⁰ and the House concurred on June 28, 1866.⁹¹ There was a brief debate in the Senate.⁹² A contemporary account states that:

The vote was a party one in both branches of the legislature. The Democrats opposed the amendment on the grounds of expediency and policy, and contended that Congress was powerless to change the Constitution during the enforced exclusion of certain Representatives from Congress. This view was repelled by the Republicans, who held that Congress has against conquered rebels all the powers of conquest.⁹³

SCHOOLS

In 1866, the Secretary of the Board of Education, in his report to the legislature, remarked on the general educational situation as follows:

For many years the opportunities have not been so favorable as they are just now for uniting all classes in the community, irrespective of creed, party, or nationality, in vigorous efforts for the improvement of public education. Important questions in respect to the abolition of slavery, on which

⁸⁹ Sen. J., May Session, 1866, p. 335.

⁹⁰ *Id.*, p. 374.

⁹¹ House J., May Session, 1866, pp. 410-413.

⁹² See Sen. J., May Session, 1866, p. 374.

⁹³ *Appleton's Annual Cyclopaedia*, 1866, pp. 255-256.

the wise and good have been for years divided, and which have tended to separate even in the district school meeting those who should always have stood united in liberal and progressive sentiments, are now for ever settled. The war, which has absorbed since 1861 all the best forces of the State, has happily ended in the establishment of the Union and the vindication of the principles of local self-government. The return of peace is characterized not only at home, but in the national councils at Washington, and still more remarkably in the discussions which are in progress throughout all the Southern States, by a lively demand for the more thorough diffusion of public education as indispensable for the support of a free republic. So likewise in our own State there are manifold indications of an educational awakening.⁹⁴ * * *

Connecticut had never restricted its public schools to any class defined by color. It did prohibit for a short period the establishment of schools for the instruction of colored people who were not inhabitants of the state, on the ground that this would tend to increase the influx of Negroes into the state.⁹⁵ A colored school was established in Hartford in 1830, at the request of the colored inhabitants, and this example was followed by two or three other towns⁹⁶ but they were "broken

⁹⁴ Report of the Secretary of the Board of Education, p. 18, Conn. Doc., 1866.

⁹⁵ P. L., 1833, chapter IX, p. 425, repealed in 1838, P. L., 1838, p. 30.

⁹⁶ Special Report of the U. S. Commissioner of Education (1871), p. 328, 41st Cong., 2d Sess., vol. 13, no. 315.

up" by legislation in 1868.⁹⁷ The 1868 law provided that

The public schools of this state shall be open to all persons between the ages of four and sixteen years, and no person shall be denied admittance to and instruction in any public school in the school district where such person resides, any law or resolution of this state heretofore passed to the contrary notwithstanding.⁹⁸

LEGAL STATUS OF NEGROES

The Constitution of Connecticut restricted the franchise to white males,⁹⁹ and only voters were eligible to serve on juries.¹

DELAWARE

Delaware, although it had remained with the Union, rejected the Fourteenth Amendment in February, 1867. The joint resolution against ratification declared that adoption of the Amendment would prevent a restoration of national unity and nullify the original purposes of the United States Constitution. Delaware ratified the Amendment in 1901.

In 1867 the public schools of the State were open to white children only. Schools for colored children were provided in 1875, to be supported by taxes assessed upon the colored population. The Constitution of 1897 required equal participation of Negroes in school funds, and made separate schools mandatory.

⁹⁷ *Ibid.*

⁹⁸ P. L., 1868, c. 108.

⁹⁹ Conn., Const., 1818, Art. VI, sec. 2.

¹ Conn. Gen. Stats., 1866, title I, c. IX, sec. 129.

In 1867 stringent laws were in force against free Negroes. On the day it rejected the Amendment, the legislature also rejected a bill to permit Negroes to testify in all court cases. Also in 1867, the Court of General Sessions declared the federal Civil Rights Act of 1866 void insofar as it prohibited discrimination in that respect. Negroes were excluded from jury service.

RATIFICATION

In 1865 Delaware refused to ratify the Thirteenth Amendment.² On January 2, 1867, Governor Saulsbury recommended rejection of the Fourteenth Amendment, in part because it was "so manifestly unjust to the people of ten States of the Union," in part because of its "ulterior purpose, the bestowal of the elective franchise on the African race."³

In the House the committee report recommending rejection did not discuss the details of the Amendment, but objected that its adoption "would be a breach of faith implied between the States at the time of the ratification of the Constitution."⁴ A minority report stated that the amendment contained "honorable, magnanimous * * * [and] lenient terms."⁵ The majority report was adopted,⁶ and on February 7 the Senate voted against ratification.⁷

² Dela. Laws, 1865, c. 592.

³ House J., 1867, pp. 18, 20.

⁴ *Id.*, p. 224.

⁵ *Id.*, p. 225.

⁶ *Id.*, p. 226.

⁷ Sen. J., 1867, p. 176.

In 1901, the Delaware legislature ratified the Thirteenth, Fourteenth, and Fifteenth Amendments.⁸

SCHOOLS

A general system of free public schools in Delaware was first established in 1829.⁹ The 1829 law provided that the schools should be free "to all the white children of said district."¹⁰ This provision continued¹¹ until the Constitution of 1897 was adopted, providing that "in * * * apportionment [of school funds] no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained."¹²

It was not until 1875 that provision was made for tax support of colored schools,¹³ and in 1881, the state began to appropriate money for them.¹⁴

LEGAL STATUS OF NEGROES

Delaware had been among the more liberal of the slave states in its legislation toward Negroes: they were presumed free rather than slave; laws providing against the importation of slaves into the State, even those whose owners had taken them out temporarily, acted to decrease the slave population; and stringent penalties attached to persons attempting to re-enslave the free Negroes

⁸ Dela. Laws, 1901, c. 235.

⁹ Dela. Laws, Rev. Ed., 1829, p. 486.

¹⁰ Dela. Laws, Rev. Ed., 1829, p. 493.

¹¹ See Dela. Rev. Code, 1852, c. 42, § 11 (3).

¹² Const. 1897, Art. X, § 2.

¹³ Dela. Laws, 1875, c. 48.

¹⁴ Dela. Laws, 1881, c. 362.

of the state.¹⁵ Measures were, however, directed against the possible political organization of the free Negroes,¹⁶ and these were strengthened during the Civil War.¹⁷

The House on the day it rejected the Fourteenth Amendment also rejected a bill giving Negroes the same right to appear as witnesses as accorded to whites,¹⁸ and the Delaware Court of General Sessions declared the federal Civil Rights Act of 1866 void insofar as it gave Negroes that right in the states. *State v. Rash*, Houst. Cr. 271 (1867). Negroes were excluded by law from juries until the law was declared invalid in *Neal v. Delaware*, 103 U. S. 370 (1880). Miscegenation was prohibited,¹⁹ and Negroes were barred from voting.²⁰

FLORIDA

Florida rejected the Fourteenth Amendment in December, 1866. One of the reasons given was that the Amendment was destructive of the rights of the states by investing Congress with vast powers. The later ratification, in June 1868, by the Reconstruction legislature, was perfunctory. Prior to the Civil War Negroes were excluded from the public schools. Schools for freedmen were established in 1866. The Constitution of

¹⁵ See, generally, 4 *Judicial Cases concerning American Slavery and the Negro*, pp. 211-215.

¹⁶ Dela. Laws, 1832, c. 176.

¹⁷ See Dela. Laws, 1863, c. 305.

¹⁸ House J., 1867, p. 228-29.

¹⁹ Dela. Rev. Stats., 1852 (1874 ed.), Tit. 11, c. 74, sec. 1.

²⁰ Const. 1831, Art. IV, § 1.

1868 outlawed all civil and political distinctions based on race or color, and provided for educational facilities for all children. A law in 1869 established a uniform system of public schools, without any reference to segregation. A Civil Rights Act enacted in 1873 prohibited racial discrimination in the public schools. The Constitution of 1885 forbade mixed schools, and subsequent legislation required separate schools for Negroes.

RATIFICATION

Florida in December, 1866, rejected the Fourteenth Amendment. Governor Walker, in recommending rejection, said with reference to sections 1 and 5 of the Amendment:

These two Sections taken together, give Congress the power to legislate in all cases touching the citizenship, life, liberty or property of every individual in the Union, of whatever race or color, and leave no further use for the State governments. It is in fact a measure of consolidation entirely changing the form of the government.²¹

The Senate Committee on Federal Relations made the same objection:

Section I of this proposed article would confer upon Congress all the powers which are now supposed to appertain to the States.—From the moment of its engraftment upon the Constitution of the United States, the States would in effect cease to exist as bodies politic, for at the instant of its adoption a great central power, which is ever the enemy of freedom and advance-

²¹ House Journal, 1866, p. 76.

ment would exist at Washington. The Congress would under this section alone subvert and change the whole domestic economy of a State, regardless of the approval or disapproval of the people thereof; for in the construction of this section as those that follow, it becomes necessary to consider the fifth section to this proposed amendment and when we do that we are appalled, and well might the people of every State in this Union pause and consider as to the power which might be taken and seized under the head of "appropriate legislation."²²

The report of the House Committee on Federal Relations was similar:

The first section of this amendment, considered in connection with the fifth, is virtually an annulment of State authority in regard to rights of citizenship. It invests the Congress of the United States with extraordinary power at the expense of the States. It would so operate that under its provisions all persons, without distinction of color, would become entitled to the "privileges and immunities" of citizens of the States, and among those privileges would be embraced the elective franchise, as well as competency to discharge the duty of jurors. In addition to this, without denying to the State the power and right to legislate and to control to some extent the liberty and property of the citizen, it vests in the General Government the power to annul the laws of a State affecting life, liberty and property of its people, if

²² *Id.*, p. 102.

Congress should deem them subject to the objections therein specified.²³

With reference to the second section of the Amendment, the report stated:

We cannot at this time, just as they have emerged from slavery, without education, and controlled by prejudice, invest them with the elective franchise without restriction or qualification. We have done everything already that is necessary to secure their practical advancement.

The following article is incorporated in the Constitution of this State:

"All the inhabitants of this State, without distinction of color, are free and shall enjoy the rights of person and property without distinction of color." "In all criminal proceedings founded upon injury to a colored person, and in all cases affecting the rights and remedies of colored persons, no person shall be incompetent to testify as a witness on account of color."

The General Assembly at its last session passed an act providing that "all the criminal laws of this State shall be deemed and held to apply equally to all the inhabitants of the same, without distinction of color."

This State, while it has no system of public schools for the whites, has instituted a common school system even in her bankruptcy for this portion of our population, and is distributing elementary books all over the State. Six thousand blacks are now availing themselves of State aid for the purposes of education.

²³ House Journal, 1866, p. 76.

These measures and any others which will tend to their practical advancement and improvement, we deem it our duty and pleasure to adopt, and we do not think it just that the general government should declare that we must in addition give them at once the elective franchise without qualification, thereby ruining our interests, theirs, and the country's, or our representation shall be reduced in the proportion which the males among them, twenty-one years of age and not invested with the right to vote, bear to the whole number of male citizens twenty-one years of age in this State.²⁴

Both Houses rejected the Amendment unanimously.²⁵

The later ratification by the Reconstruction legislature was perfunctory. On June 9, 1868, the Governor sent the following message:

Gentlemen of the Senate and the Assembly:

You are assembled under the provisions and in obedience to the requisitions of the Constitution of the State, adopted in accordance with the acts of Congress.

Until admitted to representation upon the floor of Congress, your acts will be merely provisional.

I therefore recommend that no action be taken save that dictated by the acts of Congress as conditions precedent to admission, to wit: The passage of the proposed amendment to the Constitution, known as the Fourteenth Article, and the election of United States Senators—unless it be to ratify the Thirteenth Article, already

²⁴ *Id.*, p. 77-78.

²⁵ Senate Journal, 1866, p. 111; House Journal, 1866, p. 150.

adopted, your immediate assent to which I advise.

After we shall have been recognized by Congress in the admission of our Representatives and Senators, I shall communicate more at length upon the general interests of the State.²⁶

Action in the Senate took place immediately. The vote for ratification was 10 to 3.²⁷

In the House, approval was equally rapid. The vote was 23 to 6.²⁸

SCHOOLS

Prior to the war the public school system was limited to white children only.²⁹ Any education of Negroes was discouraged. A territorial act had made it unlawful for free Negroes or mulattoes to assemble "for the purpose of preaching or exhorting, or for any other purpose, unless it be for the purposes of labour * * *."³⁰ A similar prohibition was enacted after Florida became a State.³¹ In 1866 this prohibition, among others on the conduct of Negroes, was repealed.³²

In 1865, Governor Walker had recommended against the establishment of any Negro schools:

* * * in the present condition of this population, it would be premature to attempt to organize any general system of education * * *. The first lesson to be taught them is, that their new-found *liberty* is not *license*, and that labor is ordained of

²⁶ Senate Journal, 1868, p. 7.

²⁷ *Id.*, p. 9.

²⁸ House Journal, 1868, pp. 8-9.

²⁹ Florida Acts, 1848, c. 229, Art. I, Sec. 3.

³⁰ Florida Acts, 1832, No. 94, Sec. 10.

³¹ Florida Acts, 1846, c. 87, Sec. 9.

³² Florida Acts, 1865, c. 1474, p. 37.

God, and a necessity of their condition * * *.³³

The Assistant Superintendent of Education of the Freedmen's Bureau, however, stated that the "negro should be educated, at least in the rudiments of a common school education," but that the expense should be borne by the Negroes because of "the embarrassment of the finances of the State." He said:

I am convinced that one of the best means to make the freedmen contented, industrious and reliable as a laboring class, is to provide schools for their children.³⁴

In 1866 the legislature passed "An Act Concerning Schools for Freedmen." This provided for a Superintendent of Common Schools for Freedmen, who was directed "to establish schools for freedmen, when the number of children of persons of color, in any county or counties will warrant the same * * *" to the extent that funds permitted. The cost was to be defrayed by tuition fees collected from each pupil and by a poll tax of \$1.00 on "male persons of color" between the ages of 21 and 55.³⁵

The Governor's message to the 1868 legislature recommended enactment of a law to organize a public school system, but made no reference either to Negro education or to the Fourteenth Amendment.³⁶ At that time there were in existence private schools for both races, schools for freed-

³³ Sen. J., 1865, pp. 59-60.

³⁴ House J., 1865, p. 221.

³⁵ Florida Acts, 1865, c. 1475, p. 37.

³⁶ House J., 1868, p. 60.

men operated under the auspices of the state, and schools operated under the auspices of northern benevolent associations."

The Constitution of 1868 contained the following provisions relative to education in the form recommended by the Convention's Committee on Education:

ARTICLE IX

SECTION 1. It is the paramount duty of the State to make ample provision for the education of all the children residing within its borders, without distinction or preference.

Sec. 2. The legislature shall provide a uniform system of common schools, and a university, and shall provide for the liberal maintenance of the same. Instruction in them shall be free.

It was also declared in Article XVII, Section 28, that:

There shall be no civil or political distinction in this State on account of race, color, or previous condition of servitude, and the legislature shall have no power to prohibit by law any class of persons, on account of race, color, or previous condition of servitude, to vote or hold any office, beyond the conditions prescribed by this constitution.³⁷

On January 30, 1869, the Governor approved "An Act to establish a Uniform System of Common Schools and a University." It directed that

There shall be established, and liberally maintained, a uniform system of public

³⁷ Report of the Superintendent of Public Schools, Fla., House J., 1869, pp. 76-85.

³⁸ See Convention Journal, pp. 69-71, 101.

instruction, free to all the youth residing in the State between the ages of six and twenty-one years, so far as the funds will admit, as hereinafter provided.

The Board of Public Instruction of each county was required

To locate and maintain schools in every locality in the county where they may be needed, to accommodate, as far as practicable, all the youth between the ages of six and twenty-one years during not less than three months in each year.

There was no specific reference to the question of separate or mixed schools.³⁹

In 1885 the Constitution was amended to provide that

White and colored children shall not be taught in the same school, but impartial provision shall be made for both. [Art. XII, Sec. 12]

In 1887 the Legislature enacted a statute requiring separate schools.⁴⁰

CIVIL RIGHTS LEGISLATION

In 1870 it was made illegal to deny the right of conveyance to any person. It was further provided that "all persons shall have equal privileges of accommodation and conveyance on all railroads, steamboats, stages, and other public means of travel in this State".⁴¹

³⁹ Florida Laws, 1869, c. 1686, pp. 7-19.

⁴⁰ See Florida Laws, 1887, c. 3692, p. 36, for separate normal schools.

⁴¹ Florida Laws, 1870, c. 1744, p. 35.

The Civil Rights Act enacted in 1873 made specific reference to schools. It provided:

SECTION 1. That no citizen of this State shall, by reason of race, color, or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility, or privilege furnished by inn-keepers, by common carriers, whether on land or water, by licensed owners, managers, or lessees of theatres or other places of public amusement; by trustees, commissioners, superintendents, teachers, and other officers of common schools and public institutions of learning, the same being supported by moneys derived from general taxation, or authorized by law, also of cemetery association and benevolent associations, supported or authorized in the same way: *Provided*, That private schools, cemeteries, and institutions of learning established exclusively for white or colored persons, and maintained respectively by voluntary contributions, shall remain according to the terms of the original establishment.

* * * * *

SEC. 3. That every discrimination against any citizen on account of color by use of the word "white" or any other term in any law, statute, ordinance, or regulation, is hereby repealed and annulled.

SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as juror in any court in this State by reason of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the

reason above named, shall, on conviction thereof, be guilty of a misdemeanor, and be fined not less than one hundred nor more than one thousand dollars.

SEC. 5. All acts conflicting with the provisions of this act are hereby repealed.⁴²

Similarly, in the following year in an act defining the privileges and obligations of hotel keepers, one section provided that "nothing in this Act shall be construed so as to discriminate in relation to the rights of guests in consequence of race or nationality."⁴³

GEORGIA

Georgia rejected the Fourteenth Amendment in November 1866 with protests directed largely at the power granted to Congress; the Amendment was ratified in July 1868 without discussion, and again in February 1870 because of a question as to the legitimacy of the membership of the 1868 legislature. In 1866 public schools for whites only had been established. The Constitution of 1868 made no reference to separate schools, but the legislature in providing a system of public education in 1870 required segregation.

RATIFICATION

Georgia rejected the Fourteenth Amendment in 1866. Governor Jenkins recommended rejection, in part because of the power it gave to Congress, saying:

The fifth and last section empowers the Congress "to enforce, by appropriate

⁴² Florida Laws, 1873, No. 13, c. 1947, p. 25.

⁴³ Florida Laws, 1874, c. 1999, p. 65.

legislation," the provisions of the Amendment. It will be contended that they are the proper judges of what constitutes appropriate legislation. If, therefore, the Amendment be adopted, and a fractional Congress, from which the Southern States, chiefly interested in it, are excluded, be empowered "to enforce it by *appropriate legislation*," what vestige of hope remains to the people of those States? Nay, more, what semblance of Republican Government can the true patriot of the North discern in such a state of affairs? Yet, that is the point to which we seem to be drifting; * * *.

I will not further analyze this Amendment, equally novel and unjust."

The report of the Joint Committee of the Legislature on the State of the Republic, recommended rejection but did not discuss the substance of the amendment. It based its recommendation on the argument that the Amendment had not been legally proposed, since it came from a Congress in which the Southern States were not represented.⁴⁵ The recommendation was accepted by both Houses on November 9, 1866."

Georgia's subsequent ratification was without discussion. On July 21, 1868, the House of Representatives and the Senate received the following message from the Governor:

By the provision of the act of Congress entitled "An act to admit the States of North Carolina, South Carolina, Louisiana,

⁴⁵ Senate Journal, 1866, p. 8; House Journal, 1866, p. 9.

⁴⁶ Senate Journal, 1866, pp. 65-71; House Journal, 1866, pp. 61-68.

⁴⁷ Senate Journal, 1866, p. 72; House Journal, 1866, p. 68.

Georgia, Alabama, and Florida, to representation in Congress," passed June 25th, 1868, you are required to duly ratify the amendment to the Constitution proposed by the 39th Congress, and known as Article 14, and by solemn public act declare the assent of the State to that portion of the act of Congress which makes null and void the first and third subdivisions of section 17 of the fifth article of the State Constitution, except the proviso to the first subdivision, before the State shall be entitled and admitted to representation in Congress as a State of the Union.

Copies of the said act of Congress, and of the said proposed amendment to the Constitution, are herewith transmitted.⁴⁷

The House immediately approved ratification by a vote of 89 to 69.⁴⁸

In the Senate, the proceedings were equally perfunctory. The Senate rejected a motion to refer the question to committee and approved ratification by a vote of 27 to 14.⁴⁹

Shortly thereafter the Legislature of 1868 excluded its Negro members. The acts of the Legislature were held invalid by Congress on the ground that it contained members disqualified under the Reconstruction Acts. Pursuant to congressional act of December 22, 1869, the Legislature was reconvened with its original Negro members present and its disqualified white members excluded.⁵⁰ On February 2, 1870, the Four-

⁴⁷ House Journal, 1868, p. 49.

⁴⁸ *Id.*, pp. 49-50.

⁴⁹ Senate Journal, 1868, pp. 44-46.

⁵⁰ See message of Governor Bullock, Senate Journal, 1870, pp. 47-66; House Journal, 1870, pp. 52-72.

teenth Amendment was again ratified with no discussion.⁵¹

SCHOOLS

The Georgia Legislature of 1866 provided for a system of free public schools open only to free white inhabitants.⁵²

The Georgia Constitution of 1868 contained the following provisions:

ARTICLE I. SEC. 2. All persons born or naturalized in the United States, and resident in this State, are hereby declared citizens of this State, and no laws shall be made or enforced which shall abridge the privileges or immunities of citizens of the United States, or of this State, or deny to any person within its jurisdiction the equal protection of its laws. And it shall be the duty of the General Assembly, by appropriate legislation, to protect every person in the due enjoyment of the rights, privileges and immunities guaranteed in this section.

ARTICLE VI. SEC. 1. The general assembly, at its first session after the adoption of this constitution, shall provide a thorough system of general education, to be forever free to all children of the State, the expense of which shall be provided for by taxation or otherwise.

In the Constitutional Convention the Committee on Education had proposed a provision authorizing separate schools, which read as follows:

SEC. 2. Separate departments in all the Public Institutions of the State, and separate Schools, may be established by law, for

⁵¹ Senate Journal, 1870, p. 70; House Journal, 1870, p. 74.

⁵² Georgia Laws, 1866, No. 108, p. 59.

such scholars as may be required to occupy such separate departments or Schools: *Provided*, That no partiality shall be shown in such regulations.⁵³

A substitute was offered which referred to "separate public institutions for learning" as distinguished from the "Common Schools."⁵⁴ Neither this proposal nor that of the Committee on Education was accepted, and the Constitution as adopted contained no reference to "separate schools."⁵⁵

The Legislature of 1870 provided for a system of public education for all but specified separate schools for white and colored.⁵⁶ It was provided

That it shall be the duty of the trustees, in their respective districts, to make all necessary arrangements for the instruction of white and colored youth of the district in separate schools. They shall provide the same facilities for each, both as regards school-houses and fixtures, and the attainments and abilities of teachers, length of term-time, etc.; but the children of the white and colored races shall not be taught together in any sub-district of the State.⁵⁷

Attempts in the House to eliminate racial references had been defeated.⁵⁸

Substantially similar provisions were repeated in the 1871 and 1872 revisions of the school law.⁵⁹ Finally, the Constitution of 1877 specified that

⁵³ Convention Journal, p. 131.

⁵⁴ *Id.*, p. 477.

⁵⁵ *Id.*, pp. 479-483.

⁵⁶ Georgia Laws, 1870, No. 53, pp. 49-61.

⁵⁷ *Id.*, § 32.

⁵⁸ See House Journal, 1870, pp. 434, 449.

⁵⁹ Georgia Laws, 1871, No. 7, pp. 279-281; Georgia Laws, 1872, No. 71, pp. 69, 72.

The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races.⁶⁰

Governor Bullock, in August 1870 in recommending the establishment of a university for colored students, based his recommendation on "justice" and "good policy," "so that separate facilities shall be afforded to colored students, equal in kind and character to those now furnished to white students in the State University of Athens."⁶¹

CIVIL RIGHTS LEGISLATION

The same legislature which enacted the public school law of 1870 required equal facilities on common carriers. The "Act to regulate Common Carriers in this State" provided in part that

* * * all common carriers of passengers for hire in the State of Georgia shall furnish like and equal accommodations for all persons, without distinction of race, color or previous condition.⁶²

Another Act enacted in 1870 required

That the different railroads in this State acting as public carriers be required to furnish equal accommodations to all, without regard to race, color or previous condition, when a greater sum of fare is exacted than was demanded prior to January 1, 1861, which was at that date half fare for persons of color.⁶³

⁶⁰ Art. VIII, Sec. I.

⁶¹ House Journal, 1870, p. 416.

⁶² Georgia Laws, 1870, No. 258, p. 398.

⁶³ Georgia Laws, 1870, No. 289, p. 427.

ILLINOIS

Illinois ratified the Fourteenth Amendment in January, 1867. At that time Negroes were excluded from the public schools and were virtually without educational facilities. In 1872 a school law was enacted which provided for public education for all children, without reference to their race or color. Nevertheless, segregated schools were established in some areas; in other areas the schools were racially integrated. In 1874, Negro children were held entitled to admission to white schools where separate equal facilities were not available. *Chase v. Stephenson*, 71 Ill. 383. In 1882 segregated schools were held to violate the state law, without reference to the Fourteenth Amendment. *People v. Board of Education*, 101 Ill. 308. In 1865 Negroes were qualified as witnesses in court proceedings, but until 1870 they could not vote, serve as jurors, or serve in the militia.

RATIFICATION

Governor Oglesby, in his Message of January 7, 1867,⁶⁴ recommended ratification of the Fourteenth Amendment, which "after full and deliberate discussion, has received a most emphatic approval and indorsement by the people of the State."⁶⁵ The Governor declared:

* * * While in some sense it may be supposed the necessity for this amendment grew out of the late rebellion, and that it was framed with direct reference to the

⁶⁴ House J., Reg. Sess., 1867, p. 12.

⁶⁵ Sen. J., Reg. Sess., 1867, p. 40.

state of facts resulting from the war, it is candidly submitted that there is not a principle asserted, a right declared, or a duty defined by it, that might not, with great propriety, have been engrafted upon the Constitution, without any reference to the war, and independently of and antecedently to it. Are not all persons born or naturalized in the United States and subject to its jurisdiction, rightfully citizens of the United States and of each State, and justly entitled to all the political and civil rights citizenship confers? and should any State possess the power to divest them of these great rights, except for treason or other infamous crime?

* * * * *

This is a government of the people, based upon certain and well defined principles of universal justice, carefully guarding and regulating the rights of all men—defining the distinctions between right and wrong in the light of equal liberty to all—and, as we all hope who love it, created to stand as long as human liberty shall be worth preserving. * * *

If the pending constitutional amendment shall fail, or if adopted shall still fail to secure these ends, other more adequate and comprehensive measures will be inaugurated, which shall not fail to restore and re-establish the government upon the basis of the indivisibility of the Union, the supreme authority of its laws, and the equal liberty of all its citizens in every State in the Union. * * * ⁶⁰

⁶⁰ *Id.*, pp. 40-41.

The Senate, after debate (unreported), voted for ratification on January 10, 1867;⁶⁷ the House voted likewise on January 15, 1867, apparently without any debate,⁶⁸ and after an unsuccessful motion to refer the matter to the Committee on Federal Relations.⁶⁹

SCHOOLS

The early school system of Illinois, which had its beginnings in 1825,⁷⁰ was on a voluntary local basis and was expressly for white children. In 1857 a system of free, state-supported schools was introduced, but colored children were excluded by implication. The school law of 1857⁷¹ provided that the public school funds were to be apportioned according to the number of white children in a district (section 16), and that in townships where there were persons of color, the school trustees were to refund to them the amount of school taxes collected from them (section 80), presumably so that they could use them for separate schools for colored children.⁷²

The Superintendent of Public Instruction, in 1865, initiated a census of colored children of school age,⁷³ and found that they numbered approximately 6,000. In his Report to the 25th Session of the Legislature (which was to ratify the Fourteenth Amendment) he said:

⁶⁷ *Id.*, p. 76.

⁶⁸ House J., Reg. Sess., 1867, p. 155.

⁶⁹ *Id.*, p. 154.

⁷⁰ Ill. P. L., 1825, p. 121.

⁷¹ Ill. P. L., 1857, p. 259.

⁷² Report of the Superintendent of Public Instruction for 1865-1866, p. 28, Ill. Doc., 1867, vol. 1.

⁷³ *Id.*, p. 27.

For the education of these six thousand colored children, the general school law of the State makes, virtually, no provision. By the discriminating terms employed throughout the statute, it is plainly the intention to exclude them from a joint participation in the benefits of the free school system. Except as referred to by the terms which imply exclusion, and in one brief section of the act, they are wholly ignored in all the common school legislation of the State. * * * I commend the subject to the attention of the General Assembly, as demanding a share of public regard.⁷⁴

In 1868, the Superintendent, in reply to a questionnaire from the Indiana Superintendent of Public Instruction, made the following statement:

Colored citizens are not allowed to vote. They are not entitled to the privileges of the Public School Fund, but all school taxes paid by them are required to be refunded. Their children are not by law admitted into the public schools, but in a few districts, where no objection is made, they are admitted.⁷⁵

At the same time, Chicago, which operated its own school system, reported the following experience with separate and mixed schools:

For one year, 1864-1865, the experiment of a separate colored school was tried. The school was disorderly and much trouble existed in the vicinity of the school. The Legislature in 1864-5, abolished this school, and since that time colored children have

⁷⁴ *Id.*, pp. 28-29.

⁷⁵ Report of the Superintendent of Public Instruction of Indiana for 1867-68, p. 26, Ind. Doc. 1867-68, vol. 1.

been admitted to the public schools on an equality with other children. Not a word of complaint has come, with perhaps one or two individual exceptions, arising from seating pupils, a matter which is easily remedied. Colored children are admitted to our High School. One graduated last year. Others will graduate this year. All difficulty with the children of color has disappeared, except such as may be common to all children who have had no better advantages than themselves. We certainly have less frequent complaints than in the separate system.⁷⁶

In his report to the 1869 legislature the Superintendent again urged that the school law be amended to provide for Negro education, saying:

* * * I regard the longer presence in the school law of this great and free commonwealth, of provisions which now exclude 7,000 children, of lawful school age, from all the blessings of public education * * * as alike impolitic and unjust; the opprobrium and shame of our otherwise noble system of free schools. No State can afford to defend or perpetuate such provisions, and least of all the State that holds the dust of the fingers that wrote the proclamation of January first, 1863. Let us expunge this last remaining remnant of the unchristian "black laws" of Illinois, and proclaim in the name of God, and the Declaration of Independence, that *all* the school-going children of the State, without distinction, shall be equally entitled to share in the rich provisions of the free school system."

⁷⁶ *Id.*, pp. 26-27.

⁷⁷ Report for 1867-68, pp. 20-21, Ill. Doc. 1869, vol. 2.

On the question of segregated or mixed schools, he said:

Nor need any one be scared by the phantom of blended colors in the same school-room. The question of co-attendance, or of separate schools, is an entirely separate and distinct one, and may safely be left to be determined by the respective districts and communities, to suit themselves. In many places there will be but one school for all; in many others there will be separate schools. This is a matter of but little importance, and one which need not and cannot be regulated by legislation. Only drive the spirit of caste from its *intrenchments in the statute*, giving all equal educational rights *under the law*, and the consequences will take care of themselves.⁷⁸

The Constitutional Convention which met in 1869 and 1870 amended the education article to provide for "a thorough and efficient system of free schools, whereby all the children of this State may receive a good common school education" (Article 8, sec. 1). In the Convention Mr. Washburn offered a resolution to the effect that the Constitution should provide for mandatory school segregation and for a separation of the funds obtained from taxation of white and colored persons.⁷⁹ He said:

* * * In view of the prospective settlement of the negro suffrage question, it is eminently desirable that all other questions of public interest affecting that race should also be settled speedily and permanently, so as to close out, if possible, all future agita-

⁷⁸ *Id.*, p. 21.

⁷⁹ Illinois Constitutional Convention, 1869, Debates and Proceedings, p. 679.

tion of the public mind upon this vexed question; and this can be done only by constitutional enactment.

It cannot be denied or ignored that the question of mixed schools has greatly agitated the public mind in some portions of the State, that the question is every day growing more important, and that the agitation of the subject will continue and increase until it shall have been settled one way or the other by the organic law.

* * * The people demand of this Convention an opportunity to decide for themselves whether they will have mixed schools or separate schools for the two races; whether they will have social equality of the races, by compelling associations in the public schools of the State.⁸⁰

The resolution was tabled.^{80a} There was no discussion of education for colored children, and no provision for segregated schools was written into the Constitution.

Following the adoption of the Constitution of 1870, a school law was enacted in 1872, which provided that the public schools were to be available to all children.⁸¹ It contained no reference to racial distinctions. The State Superintendent of Public Instruction construed the law as not prohibiting separate schools, but requiring equal facilities for Negroes.⁸² The matter being left to the discretion of the local school authorities, seg-

⁸⁰ *Id.*, pp. 679-680.

^{80a} *Id.*, p. 703.

⁸¹ Ill. P. L., 1872, p. 700, 712, § 34.

⁸² Report of the Superintendent of Public Instruction for 1871-72, pp. 115 *et seq.*, Ill. Doc., 1873, vol. 2.

regated schools were established in some areas; in other areas the schools were racially integrated.⁸³ *Chase v. Stephensen*, 71 Ill. 383, decided in 1874, held that Negro children were entitled to admission to white schools if equal facilities were not available to them elsewhere; it left open the question whether separate schools, if equal, were permissible. The Fourteenth Amendment was not discussed.

The matter was taken up in the Legislature in 1874. Two proposals in favor of a statutory requirement for segregation in the public schools were defeated.⁸⁴ The Legislature in March, 1874, passed "An Act to protect colored children in their rights to attend public schools."⁸⁵ It provided:

§ 1. * * * That all directors of schools, boards of education, or other school officers whose duty it now is, or may be hereafter, to provide, in their respective jurisdictions, schools for the education of all children between the ages of six and twenty-one years, are prohibited from excluding, directly or indirectly, any such child from such school on account of the color of such child.⁸⁶

This law, however, did not end segregated schools in the State. See *People ex rel. Longress v. The Board of Education*, 101 Ill. 308. In

⁸³ Report for 1873-74, pp. 48 *et seq.*, 259 *et seq.* The Superintendent commented with approval on the opinion of the Ohio Court in *State v. McCann*, 21 Ohio St. 198. *Id.*, pp. 45-46.

⁸⁴ Sen. J., 1874, p. 177.

⁸⁵ Ill. Rev. Stat., 1874, c. 122, §§ 100-102.

⁸⁶ *Ibid.*

that case, decided in 1882, the Supreme Court of Illinois held that where a city was divided into several school districts, the assignment of colored pupils to one school exclusively rather than to the schools in their district was not authorized by state law. The court stated that it did not find it necessary to determine the applicability of the Fourteenth Amendment to the question.

LEGAL STATUS OF NEGROES

In 1865, the Legislature repealed a statute declaring Negroes and Indians incompetent as witnesses.⁸⁷ At the time the Fourteenth Amendment was ratified by the Legislature, the selection of jurors was expressly limited to whites,⁸⁸ and miscegenation was prohibited.⁸⁹

In the Constitution of 1870 the word "white" was stricken out wherever it occurred. Attempts by a minority in the Constitutional Convention to restrict the militia to whites were defeated, the majority report stating that the Fourteenth Amendment prohibited such a restriction.⁹⁰

A Civil Rights Act guaranteeing equal treatment in public accommodations and facilities was enacted in 1885.⁹¹

INDIANA

Indiana ratified the Fourteenth Amendment in January, 1867. Although the debates in the Legis-

⁸⁷ Ill., Laws, 1865, p. 105.

⁸⁸ Gross, Ill. Stats., 1818-1869, c. 58, sec. 1.

⁸⁹ *Id.*, c. 69, sec. 2.

⁹⁰ Constitutional Convention, 1870, Debates, vol. 1, pp. 860, 861-866.

⁹¹ Ill. Laws, 1885, p. 64.

lature were largely concerned with the question whether Negro suffrage was intended by the Amendment, one opponent of the Amendment stated that its effect would be to place colored children in the white schools. Negroes were exempted from school taxes and excluded from the public schools until 1869. The school law enacted in that year provided that separate schools were to be established for colored children and that other means of educating them might be used when in any particular area there were not enough colored children to justify a separate school. In *Cory v. Carter*, 48 Ind. 327 (1874), the Supreme Court of Indiana upheld these segregation provisions and held that the Fourteenth Amendment did not apply to segregation in public schools. In 1877 the maintenance of separate schools for colored children was made discretionary. In 1949 Indiana abandoned racially-segregated public schools. Until 1866, Indiana had imposed severe legal restrictions on the Negro. He could not immigrate into the state and he could not testify as a witness in court proceedings. In that year the Supreme Court of the state, in *Smith v. Moody*, 26 Ind. 299, held that these restrictions violated Article IV of the Federal Constitution and the Civil Rights Act of 1866. Negroes did not have the right to vote prior to the Fifteenth Amendment.

RATIFICATION

The Fourteenth Amendment was submitted to the Legislature in January, 1867. Governor Morton in his message of January 11, 1867, sum-

marized the provisions of the Amendment, and said:

No public measure was ever more fully discussed before the people, better understood by them, or received a more distinct and intelligent approval. I will enter into no arguments in its behalf before this General Assembly. Every member understands it, and is prepared, I doubt not, to give his vote for or against on the question of ratification.⁹²

He did not discuss the scope of Section 1 of the Amendment. As regards Negro suffrage, he did not favor the immediate granting of suffrage to men who but yesterday were slaves, and "the great mass of whom are profoundly ignorant and all impressed with that character which slavery impresses upon its victims."⁹³

The Senate Committee on Federal Relations recommended the passage of the Joint Resolution to ratify the Fourteenth Amendment, without elaborating on it.⁹⁴ A minority of three dissented on the ground that the time was not propitious for a change in "the organic law of the government."⁹⁵

The opponents of ratification objected to a change of the "whole organic structure of our Government" at a time when ten States were not represented in Congress, and denounced the Amendment as an attempt of the "Radical" party

⁹² House J., 1867, p. 48.

⁹³ *Id.*, p. 51.

⁹⁴ Sen. J., 1867, p. 77.

⁹⁵ *Ibid.*

to enfranchise the Negroes in its own interest.⁹⁶ The Senate voted for ratification on the same day.⁹⁷

The majority report of the Select Committee of the House recommended ratification with a brief statement along the lines of the Governor's statement.⁹⁸

The minority report listed numerous objections to ratification.⁹⁹ With regard to the first section, that report said:

The first section places all persons without regard to race or color, who are born in this country, and subject to its jurisdiction, upon the same political level, by constituting them "citizens of the United States, and of the States wherein they reside," thus conferring upon the negro race born in this country the same rights, civil and political, that are now enjoyed by the white race, and subject to no other conditions than such as may be imposed upon white citizens, including, as we believe, the right of suffrage.¹

In the House debate Mr. Kizer, in criticizing the Amendment, stated that he had no use for "negro equality."² Mr. Ross, also of the opposition, was of the view that the "privileges and immunities" which the Negro would acquire under the Amendment would be

⁹⁶ January 16, 1867, 9 Brevier Legislative Reports, 1867, pp. 44-45.

⁹⁷ Sen. J., 1867, p. 79.

⁹⁸ House J., 1867, p. 101.

⁹⁹ *Id.*, pp. 102-105.

¹ *Id.*, p. 102.

² 9 Brevier Legislative Reports, 1867, p. 79.

* * * the same as those enuring to the white man. The negro may be President—for the amendment makes him a co-equal citizen with the white man * * *. [It] will repeal all our State laws making distinctions because of race and color * * * he said this amendment would simply operate as though it had struck out the word "white" from the State Constitution; so the blackest negro would become eligible to a seat—to the Speakership—in this hall. The blacks would sit with us in the jury box, and with our children in the common schools.³

A considerable portion of the House debate was concerned with the question whether the Amendment conferred suffrage on the Negro. The objection was also raised that the Amendment merely repeated the principles of the Civil Rights Bill. On this point, Mr. Dunn, a supporter of the Amendment, said:

Well, we propose to make these principles permanent by writing them in the fundamental law * * * If you have not this amendment, and the civil rights bill be declared unconstitutional, the negro will be in a worse condition than he was before his emancipation.⁴

The House voted for ratification on January 23, 1867.⁵

³ *Id.*, p. 80. This statement is the only one dealing expressly with the question of segregated schools. It was neither enlarged upon nor contradicted by any of the other speakers.

⁴ *Id.*, p. 89.

⁵ House J., 1867, p. 184.

SCHOOLS

The Indiana Constitution of 1851 provided as follows:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government, it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific and agricultural improvement, and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all. (Art. VIII, sec. 1.)⁶

School laws were enacted in 1852⁷ and 1855.⁸ These were rendered largely ineffective by decisions of the state Supreme Court declaring that the provisions authorizing townships and incorporated cities to assess and levy taxes for the support of schools violated the state Constitution.⁹ The law of 1852 provided for the enumeration of "children" of school age (sec. 12); the law of 1855 exempted "negroes and mulattoes" from the school tax and excluded their children from the school census and the benefits thereof (Sec. 1).

The "Act to provide for a general system of Common Schools" of March 6, 1865,¹⁰ exempted

⁶ The school system then existing was on a voluntary basis, i. e., its adoption depended on a popular vote in the counties.

⁷ Ind. Rev. Stat., 1852, vol. I, C. 98, p. 439.

⁸ Ind. Laws, 1855, C. LXXXVI, p. 161.

⁹ *Greencastle Township, Putnam County v. Black*, 5 Ind. 557 (1854), and *City of Lafayette v. Jenners*, 10 Ind. 70 (1857).

¹⁰ Ind. Laws, 1865, p. 3.

Negroes from the school tax (sec. 1) and directed an annual census only of the white children of school age (sec. 14). Colored children were thus excluded from the school system. Governor Morton, in his message to the Extra Session of the Legislature on November 14, 1865, urged that the law should be amended to provide for inclusion of colored children in the enumeration, and that a proportionate share of the school fund be set aside for their education. He voiced the opinion that such provisions were required by the state constitution but beyond that, he declared, it was a matter of "natural justice", as well as of "sound political economy", to give the Negroes educational opportunities; finally, this would set an example to the Southern States.¹¹ He commented:

I would not recommend that white and colored children be placed together in the same schools, believing, as I do, in the present state of public opinion, that to do so would create dissatisfaction and conflict, and impair the usefulness of the schools.

I am informed that a system can be devised by which separate schools for the education of colored children can be successfully maintained in various parts of the State, and believe that justice, humanity and sound policy require that it should be done.¹²

The same arguments in favor of Negro schools were presented by the Superintendent of Public

¹¹ 8 Brevier Legislative Reports, Extra Sess., 1865, p. 31.

¹² *Id.*, pp. 31-32.

Instruction in his Report to the Legislature, dated December 31, 1866. Stating his awareness of the "extreme sensitiveness of public opinion," he suggested that separate schools be established whenever a sufficient number of Negro children reached school age in a given district, and that some other provision for their schooling be made where there were not enough children to warrant a school. He said:

* * * *Therefore*, whereas it is clear; 1, that the colored man is to remain with us, i. e., in our State; 2, that he is being, and is to be, clothed with new and larger powers of citizenship, it follows that he is becoming a greater force in both society and the State. Any force generated in, or injected into, the social or political organism at once suggests the necessity of guidance or control. Uncontrolled, evil if not ruin will ensue. But in a popular government like ours, human force in the aspect now under consideration, is most easily controlled for the good of society and the State, when the party possessing the exerting of such force, is educated. The Constitution of our State broadly and explicitly recognizes the above truth as applied to governments. * * *

Therefore, the above granted true, it follows that the welfare of the government, i. e., the State, requires the education of all the community, hence of the colored man. * * * ¹³

A convention of freedmen met in November, 1866, "to devise measures to obtain full rights of citizenship." The participants demanded the

¹³ Ind. Doc., 44th Reg. Sess., Part I, pp. 337-338.

vote for Negroes; declared they were not asking for "social equality", and "requested that colored children might be permitted to participate in the benefits of the public schools."¹⁴

In his message to the Legislature, in which he submitted the Fourteenth Amendment, Governor Morton also incorporated the recommendations for Negro education which he had made in 1865, merely adding that Negroes should be subject to like taxation with white persons for school purposes.¹⁵

The School Report for 1868 contains statements on the status of Negro education in fourteen Northern states, which the Superintendent had obtained in reply to an inquiry.¹⁶ In commenting on this information, the Superintendent did not differentiate between those states that had non-segregated schools and those providing separate schools for colored children. He urged again the "natural and constitutional right" of the colored population to a share in the school funds which were mainly derived from grants of Congress and "evidently designed for the citizens of the State without regard to color." In this context he referred to the Fourteenth Amendment: whatever distinctions might have been previously made by the laws of the state, "they have been set aside by the emendations of our National Constitution and the 'Civil Rights Bill.' All citizens are now equal before the law."¹⁷

¹⁴ *Appleton's Annual Cyclopaedia*, 1866, p. 405.

¹⁵ House J., 1867, pp. 41-42.

¹⁶ Report, pp. 24 *et seq.* Ind. Doc., 1867-68.

¹⁷ *Id.*, p. 23.

In 1869, Governor Baker in his message to the Legislature declared:

It is time that the illiberal policy heretofore pursued toward the colored people of the State in reference to the education of their children should be abandoned. * * *

If there were no higher motives to urge us to do justice in this regard, the letter and spirit of our own Constitution would seem to make the path of duty so plain that none could err therein. * * *

The precise manner in which the colored people shall be secured in their educational rights, is a question of minor importance, and one on which we can derive assistance from the experience of other States, in which the question has arisen and been settled.¹⁸

In 1869 the Legislature passed a law which admitted Negro children into the public school system.¹⁹ It provided that all property subject to taxation for State and County purposes should be taxed for the support of common schools without regard to the race or color of the owner (Sec. 1); that all children, regardless of race or color, should be enumerated for school purposes, but there were to be separate lists for the races (Sec. 2); that colored children should be organized in separate schools, "having all the rights and privileges of other schools of the township"; that where there was not a sufficient number of colored

¹⁸ House J., 1869, pp. 66-67.

¹⁹ "An Act to render taxation for Common School purposes uniform and to provide for the education of the colored children of the State," Ind. Laws, 1869 (Special Session), p. 41.

children in a district, districts might be consolidated; and that if there were not enough colored children within a reasonable distance, such "other means of education" should be provided for them "as shall use their proportion, according to numbers, of school revenue to the best advantage" (Sec. 3).

The legislative debates on the 1869 law indicate that it was a compromise between liberal proposals for admitting Negro children to the existing schools by local option²⁰ and proposals for limiting funds for Negro schools to the taxes collected from Negroes.²¹ Both in the House and the Senate doubts were expressed as to whether the provisions which were finally adopted were compatible with the state Constitution,²² but no reference was made to the Fourteenth Amendment.²³

In 1874 the Supreme Court of Indiana in *Cory v. Carter*, 48 Ind. 327, upheld the validity of the segregation provisions of the law of 1869. It declared that they violated neither the State Constitution (relying on *Lewis v. Henley*, 2 Ind. 332, decided in 1850) nor the Fourteenth Amendment (approving the reasoning of the Ohio Supreme Court in *State v. McCann*, 21 Ohio St. 198.)

The Act of 1869 was amended in 1877, for the reason that "there are a large number of colored

²⁰ 10 Brevier Legislative Reports, 1869, p. 193.

²¹ 11 Brevier, 1869, Special Session, p. 115.

²² E. g. 10 Brevier, 1869, p. 533; 11 Brevier, 1869, Special Session, pp. 115, 387.

²³ The same is true of the debate in the Senate of another education bill, which did not become law. 10 Brevier, 1869, pp. 490, 492 *et seq.*

children in this State that have not now equal educational advantages with white children.”²⁴ The establishment of separate schools for Negro children was entrusted to the discretion of the school trustees; where separate schools were not provided, colored children were to be admitted to the white schools; and when a child attending a colored school was qualified for a higher grade than that afforded by such school, he had a right to enter that grade in a white school, “and no distinction shall therein be made on account of race or color of such colored child” (Sec. 1).

Prior to the enactment of the school law of 1869, separate primary schools for colored children had been established in Indianapolis in 1868.

Ten years later the primary and grammar schools were segregated, but the high school was not.²⁵ In 1878 Fort Wayne and Logansport reported that they had abandoned segregated schools.²⁶ Other cities continued to maintain separate colored schools.²⁷

Indiana abandoned segregated schools in 1949.²⁸

LEGAL STATUS OF NEGROES

Until 1866, the Constitution and the laws of Indiana imposed severe restrictions upon Ne-

²⁴ Ind. Laws, 1877, p. 124.

²⁵ “Historical Sketches of City Schools” appended to the 26th Report of the Superintendent of Public Instruction for the years 1877 and 1878, pp. 313 *et seq.*, at 316. Ind. Doc., 1877-1878, Part 2.

²⁶ *Id.*, pp. 327, 339.

²⁷ *Id.*, pp. 346, 367, 371.

²⁸ Ind. Acts, 1949, c. 186.

groes.²⁹ It was unlawful for them to enter the State after 1851, and any Negro who entered the state illegally could not make a valid contract.³⁰ They could not testify in cases involving a white party.³¹ In *Smith v. Moody*, 26 Ind. 299 (1866), the Supreme Court of Indiana declared that these provisions violated the United States Constitution (Article IV, § 2) and the Civil Rights Act of 1866. Miscegenation, however, remained a crime.³² Negroes were not entitled to vote prior to ratification of the Fifteenth Amendment.³³

IOWA

The Fourteenth Amendment was ratified by Iowa in March, 1868. In contrast with earlier legislation, the school laws enacted in the period from 1860 to 1866 did not mention race or color. Segregated schools, however, were maintained until 1868, when the state Supreme Court in *Clark v. The Board of Directors*, 24 Iowa 266, held that they violated both the school laws and the state constitution. Negroes were permitted to appear as witnesses after 1856. In 1868 the word "white" was eliminated from the Constitution, so that Negroes obtained, *inter alia*, the right to vote, hold office and be members of the militia.

²⁹ See Governor Morton's speech on *Reconstruction and Negro Suffrage* (September 1865, Pamphlet), p. 15.

³⁰ Constitution of 1851, Article XIII; "Enforcement Act" of June 18, 1952, Ind. Rev. Stat., 1852, c. 74.

³¹ Ind. Laws, 1853, p. 60.

³² Ind. Statutes, 1870, vol. II, part III, c. VI, sec. 47.

³³ Ind., Constitution, 1851, Article II, section 5.

In *Coger v. The North West Union Packet Co.*, 37 Iowa 145 (1873), the Supreme Court held that the refusal of a steamship company to serve the colored plaintiff in the main cabin violated both the state constitution and the Fourteenth Amendment.

RATIFICATION

Governor Stone submitted the Fourteenth Amendment to the 12th General Assembly on January 14, 1868, with a brief recommendation for ratification.³⁴ The House voted in favor of ratification on January 27.³⁵ There was no debate. The Senate followed on March 9, 1868.³⁶ A motion by Senator Hollman to strike out the first, second and third sections of the Amendment was ruled out of order, as was a motion by Senator Fellows to have each section voted upon separately.³⁷

SCHOOLS

Iowa's first constitution of 1846 provided that the general assembly was to establish "a system of common schools, by which a school shall be kept up and supported in each school district, at least three months in every year" (Art. 9, sec. 3). The first school law of the state³⁸ required that the common schools were to be "open and free alike to all white persons" of school age in each district

³⁴ Sen. J., 1868, pp. 32-33.

³⁵ House J., 1868, pp. 132-133.

³⁶ Sen. J., 1868, p. 265.

³⁷ *Id.*, p. 264.

³⁸ Iowa Laws, 1846-47, c. 99.

(sec. 6).³⁹ The school law of 1849 limited the school census to white persons (sec. 51) and exempted the property of "black and mulattoes" from taxation for school purposes (sec. 88).⁴⁰

The Constitutional Convention of 1857 debated an amendment to make the public schools "equally open to all."⁴¹ It was opposed on the ground that it would entitle colored children to "mingle" with white children in the common schools.⁴² Its proponents argued that separate schools for Negroes would satisfy the requirement of equality.⁴³ The amendment was tabled, as was another which would have restricted the common schools to white children.⁴⁴ The Constitution, as adopted in 1857, required "the education of all the youths of the State, through a system of Common Schools" (Art. IX, sec. 12).

In 1858, the legislature enacted a school law,⁴⁵ which directed the district school boards to "provide for the education of the colored youth, in separate schools, except in cases where by the unanimous consent of the persons sending to the school in the sub-district, they may be permitted to attend with the white youth" (sec. 30, subd. 4).

³⁹ The school law of the Territory (Iowa Laws, 1839-40, c. 73) had no reference to race or color.

⁴⁰ Iowa Laws, 1848-49, c. 80.

⁴¹ *Debates of the Constitutional Convention, 1857*, pp. 825 *et seq.*

⁴² *Id.*, pp. 825-826.

⁴³ *Id.*, pp. 826, 829.

⁴⁴ *Id.*, pp. 832 *et seq.*

⁴⁵ An Act for the Public Instruction of the State of Iowa, Laws, 1858, c. 52.

This act was, however, declared unconstitutional in the same year that it was enacted, on grounds not related to the provisions concerning separate schools for colored children.⁴⁶ Subsequent legislation in 1860, 1862, and 1866 made provision for public education with no mention of race or color.⁴⁷ As appears from *Clark v. Board of Directors*, 24 Iowa 266 (1868), segregated schools were, nevertheless, maintained. The court held that this violated both the state constitution and the state school laws. The court stated that the general discretion of the school boards in administering the schools was "limited by the line which fixes the *equality of right* in all the youths between the ages of five and twenty-one years" (p. 275) [*italics as in original*]. The court did not discuss the relevance of the Fourteenth Amendment to the question. The decision was followed, without further discussion, in *Smith v. The Directors*, 40 Iowa 518, and *Dove v. The Independent School District*, 41 Iowa 689, both decided in 1875.

LEGAL STATUS OF NEGROES

The Iowa Constitution of 1857 limited the right of suffrage to white male citizens (Art. 2, sec. 1). Since they were barred from voting, Negroes were also excluded from juries.⁴⁸ The Constitution, however, secured their right to testify in court (Art. 1, section 4).

⁴⁶ *District Township of the City of Dubuque v. City of Dubuque*, 7 Iowa 262 (1858).

⁴⁷ Rev. Laws 1860, c. 88, secs. 2023 *et seq.*; Laws 1862, c. 172, sec. 12; Laws 1866, c. 143, sec. 3.

⁴⁸ Iowa, Revision of 1860, sec. 2720.

In November 1868, the people voted on amendments to the State Constitution to strike the word "white" from the Constitution wherever it appeared, i. e., with regard to the right of suffrage (Art. II, Section 1), eligibility for the House of Representatives and the Senate (Article III, Sections 4, 5), census of inhabitants (Article III, Section 33), apportionment of Senators (*id.*, Section 34) and Representatives (*id.*, sec. 35), and service in the militia (Article VI, Section 1).⁴⁹ All these amendments were adopted.⁵⁰ Governor Merrill declared:

Thus was finally accomplished an act of justice already too long delayed, the denial of which, on a former occasion had cast a stigma on a State which may truthfully boast that the foot of a slave has never pressed her soil.⁵¹

In 1873, the Supreme Court of Iowa held that the Fourteenth Amendment and the state constitution were violated by the refusal of a steamship company to serve meals to a colored person in the main cabin. *Coger v. The North West. Union Packet Co.*, 37 Iowa 145.

KANSAS

The Kansas legislature ratified the Fourteenth Amendment in January 1867, without debate in

⁴⁹ Sen. J., 1868, pp. 384-385; House J., 1868, p. 539.

⁵⁰ Governor Merrill's Message to the Thirteenth General Assembly (1870), pp. 46-47, Iowa Doc., 1868-69.

⁵¹ *Id.*, p. 47. In the same message Governor Merrill recommended ratification of the Fifteenth Amendment to the Federal Constitution, which he believed marked "the final eradication of the last vestige of human bondage from the polity of the republic" (*Ibid.*).

the House and without dissent in the Senate. The right of colored children to public education—which had been left open in the 1859 state constitution—was reinforced in 1867, although separate schools were permitted generally until 1876. In 1867 Negroes were barred from the polls, juries and the militia, and the electorate in that year rejected a Negro suffrage amendment to the state constitution.

RATIFICATION

Governor Crawford submitted the Fourteenth Amendment to the Legislature of 1867 with this comment:

Whilst the foregoing proposed amendment is not fully what I might desire, nor yet, what I believe the times and exigencies demand, yet, in the last canvass, from Maine to California, it was virtually the platform which was submitted to the people; the verdict was unmistakable. The people have spoken on the subject, at the ballot-box, in language which cannot be misunderstood. And as we are but their servants, to do their will, it is now our unquestionable duty to accept it, and give it our cheerful and hearty support. * * *

The abolition of slavery, the investment by the laws of Congress, of all persons born within the United States, or in case of foreigners, when naturalized, with citizenship, has precipitated upon us, as a practical question, sooner than many desired, the question of impartial suffrage. If we desired, we could no longer avoid the issue. Speaking for myself, I have no desire to avoid it, but propose to meet it, like many others that have demanded adjustment as a

consequence of a successful suppression of the rebellion. I know of no reason, in law or ethics, why a loyal citizen that has shouldered his musket in defense of the National flag; that pays his taxes; that is amenable to the law in every respect, should be excluded from a participation in every right and franchise that others enjoy who are no more worthy because of their race or color.⁵² * * *

The Amendment was adopted, without debate, by the House on January 10, 1867.⁵³ It was unanimously adopted by the Senate on January 11, 1867.⁵⁴

SCHOOLS

The 1855 territorial laws provided for the establishment of common schools, which were to be "open and free for every class of white citizens" (Chap. 144, Sec. 1). The School Act of 1858⁵⁵ did not restrict school benefits to white children. It declared expressly:

All district schools established under the authority of this act shall be free and without charge for tuition, to all children between the ages of five and twenty-one years, and no sectarian instruction shall be allowed therein.

The Constitution adopted in 1859⁵⁶ provided in Article VI, Section 2:

The legislature shall encourage the promotion of intellectual, moral, scientific and

⁵² Sen. J., 1867, p. 45.

⁵³ House J., 1867, p. 79.

⁵⁴ Sen. J., 1867, p. 76.

⁵⁵ Kan. Laws, 1858, c. 8, sec. 71.

⁵⁶ Kan. Laws, 1861, p. 46.

agricultural improvement, by establishing a uniform system of Common Schools, and Schools of a higher grade, embracing normal, preparatory, collegiate, and university departments.

As originally proposed in the Convention this section contained the additional language: "which schools shall be open for the admission of pupils of both sexes."⁵⁷ Attempts to add an express provision for exclusion of Negroes failed; it was said that the question was being left to the legislature.⁵⁸ Because some of the opposition feared, however, that the provision might be interpreted as giving Negroes a constitutional right to admittance to any school, the language was deleted.⁵⁹

In 1861 a school law was enacted,⁶⁰ framed in general terms and without reference to color distinctions, except that it empowered local school authorities

To make such order as they deem proper for the separate education of white and colored children, securing to them equal educational advantages.⁶¹

In 1862, the "Act to incorporate cities of the State of Kansas,"⁶² provided:

The city council of any city under this act, shall make provisions for the appropriation of all taxes for school purposes

⁵⁷ *Kansas Constitutional Convention* (1920), p. 170.

⁵⁸ *Id.*, pp. 175-183, 192.

⁵⁹ *Id.*, pp. 192-93.

⁶⁰ Kan. Laws, 1861, c. 76, Art. III, sec. 1 (10).

⁶¹ This provision was identical with c. 181, Art. III, sec. 19 (10) of the Compiled Laws of Kansas, 1862, p. 802, at 807.

⁶² Compiled Laws, 1862, Chapter 46, pp. 384 *et seq.*

collected from black or mulatto persons, so that the children of such persons shall receive the benefit of all moneys collected by taxation for school purposes from such persons, in schools separate and apart from the schools hereby authorized for the children of white persons (Art. 4, section 18).

This was amended in 1868. In "cities of the first class," the Board of Education was given power "to organize and maintain separate schools for the education of white and colored children."⁶³ With regard to "cities of the second class", it was provided that

In each city governed by this act, there shall be established and maintained a system of free common schools, which shall be kept open not less than three nor more than ten months in any one year, and shall be free to all children residing in such city, between the ages of five and twenty-one years.⁶⁴

The city boards of education were granted power, *inter alia*,

to provide separate schools for the education of colored and white children.⁶⁵

The 1861 general school law was amended in 1867 in respect of non-urban schools.⁶⁶ It defined the powers of the local school meetings as follows:

⁶³ Revised Statutes, 1868, Chapter 18, Art. V, Section 75.

⁶⁴ *Id.*, Chapter 19, Art. V, section 54.

⁶⁵ *Id.*, section 57.

⁶⁶ Kan. Laws 1867, Chapter 123. The law was approved on February 20, 1867.

To make such order as they may deem proper for the education of white and colored children separately or otherwise, securing to them equal educational advantages (section 1 (10)).

The Legislature also in 1867 enacted a law to enforce the provisions for public education of Negro children.⁶⁷ This law provided:

That any district board refusing the admission of any children into the common schools, shall forfeit to the county the sum of 100 dollars each for every month so offending, during which such schools are taught, and all moneys forfeited to the common school fund of the county under this Act shall be expended by the County Superintendent for the education of such children in the school district thus denied equal educational advantages: *Provided*, That any member of said district board who shall protest against the action of his said board in excluding any children from equal educational advantages shall not be subject to the penalty herein named (sec. 1).

In 1868, the State Superintendent of Public Instruction reported as follows on the enrollment of colored children:

In some localities, a very great prejudice against the co-education of the races still exists. * * * In a few districts, schools for the white children, even, were entirely suspended, in order to deprive a few colored children of the "equal educational advantages" which the law guarantees to all the

⁶⁷ An Act to regulate Common Schools, Kan. Laws, 1867, Chapter 125. Approved February 26, 1867.

children of the State, irrespective of caste or color. The true policy is to let the statute remain impartial. General intelligence will dissipate prejudices. Separate schools, in small districts, are a waste of means. Why should the highest institutions of the State be open to colored children, and the public schools be closed? ⁶⁸

In 1869, the Superintendent said in his Annual Report:

The statistics of this year do not distinguish between colored and white children. In some districts the old prejudice still exists; but the law provides that the educational advantages extended to colored children shall be in all respects equal to those furnished to white children. By the ratification of the Fifteenth Amendment to the Constitution of the United States, the right of suffrage will be conferred upon colored men, and that will do much toward removing the prejudices which now exist. The sooner, perhaps, the educational statistics of a State drop the discrimination respecting the color of persons of school age, the better. Separate schools in nearly every case are bad economy, as well as a disgrace to republican institutions. ⁶⁹

The Special Report of the federal Commissioner of Education, ⁷⁰ stated in regard to Kansas:

The people of this State have from its earliest settlement been imbued with the spirit of freedom; and their legislation in

⁶⁸ Eighth Annual Report of the Superintendent of Public Instruction, pp. 3-4, Kans. Mess. & Doc., 1868.

⁶⁹ Annual Report, pp. 2-3, Kans. Mess. & Doc., 1869.

⁷⁰ 41st Congress, 2d Session, Ex. Doc. No. 315.

reference to educational matters has consequently been free from invidious discriminations as to the several races. Their schools are generally open to black and to white children alike; and it is only at a few points, where large numbers of negro emigrants are to be found, that schools for colored children exist separately.⁷¹

In 1876, the school laws were revised and consolidated. All provisions relating to segregation were eliminated,⁷² while there were retained the provisions that the common schools were to be free for all children and those penalizing the exclusion of any child.⁷³

In 1881, the power of a school board to direct segregation of colored children was denied in *Board of Education of the City of Ottawa v. Tinnon*, 26 Kans. 1. In this case the state Supreme Court referred with approval to several decisions of the Supreme Court of Iowa⁷⁴ and concluded:

If the board has the power, because of race, to establish separate schools for children of African descent, then the board has the power to establish separate schools for persons of Irish descent or German

⁷¹ *Id.*, p. 346.

⁷² Kan. Laws, 1876, c. 122, p. 238, in particular Article III, section 11 (powers of district meeting), Article X, section 4 (powers of boards of education in cities of first class), Article XI, section 9 (powers of boards in cities of second class). But in 1879 cities of the first class were again granted the power to establish segregated schools. Kans. Laws, 1879, c. 81, sec. 1.

⁷³ *Id.*, Article V, sections 3 and 4, Article XI, section 2.

⁷⁴ *Clark v. The Board of Directors*, 24 Iowa 266; *Smith v. The Directors*, 40 Iowa 518; *Dove v. The Independent School District*, 41 Iowa 689.

descent; and if it has the power, because of color, to establish separate schools for black children, then it has the power to establish separate schools for red-headed children and blondes. We do not think that the board has any such power. We have conceded, for the purposes of this case, that the legislature has the authority to confer such power upon school boards; but in our opinion the legislature has not exercised or attempted to exercise any such authority (pp. 22-23).

The court also touched upon the effect of the Fourteenth Amendment on racial segregation in public schools, as to which it concluded:

The question whether the legislatures of states have the power to pass laws making distinctions between white and colored citizens, and the extent of such power, if it exists, is a question which can finally be determined only by the supreme court of the United States; and hence we pass this question, and proceed to the next, over which we have more complete jurisdiction (p. 18).

Judge Brewer (later a justice of the United States Supreme Court), dissented "entirely from the suggestion that under the fourteenth amendment of the federal constitution, the state has no power to provide for separate schools for white and colored children. I think, notwithstanding such amendment, each state has the power to classify the school children by color, sex or otherwise, as to its legislature shall seem wisest and best" (pp. 23-24). He also held that the board, under the general authorization of

the school law of the state, had the power to make such classifications.

LEGAL STATUS OF NEGROES

Article V, section 1, of the Constitution of 1859 restricted suffrage to white males. The selection of juries was limited by statute to qualified electors.⁷⁵ In 1867, the year in which the Legislature ratified the Fourteenth Amendment, the electorate rejected amendments to give the vote to Negroes and to women.⁷⁶

The earlier territorial law of 1855 declaring Indians and Negroes incompetent as witnesses⁷⁷ appears nowhere to have been expressly repealed, but it does not appear in the General Statutes compiled in 1868.

KENTUCKY

Kentucky never ratified the Fourteenth Amendment. It rejected the Amendment in January, 1867 by large margins in both houses. The school system since 1838 had provided for education of white children only, and colored persons were exempt from some of the taxes which supported it. In 1867 colored schools were authorized, but they were not generally established until mandatory provisions were enacted in 1874. The 1874 legislation expressly provided for segregated schools. Negroes were barred from voting and serving as jurors.

⁷⁵ Kans. Gen. Stat., 1868, c. 54, sec. 2.

⁷⁶ *Kansas Constitutional Convention* (1920), App., p. 594.

⁷⁷ Kans. Terr., Laws, 1855, c. 165, Sec. 22.

RATIFICATION

Governor Bramlette, in his message to the Kentucky Legislature on January 4, 1867, urged that the Fourteenth Amendment had not been constitutionally proposed since the Southern States were not represented in Congress and the necessary two-thirds of the Congress was not present.⁷⁸ The House of Representatives on January 8, 1867, rejected the Amendment by a vote of 67 to 27,⁷⁹ and the Senate, on the same day, by a vote of 24 to 9.⁸⁰ There appears to have been no debate by either house.

SCHOOLS

In 1830, the Kentucky legislature passed an act "to encourage the general diffusion of education,"⁸¹ which permitted, but did not require, the counties of the Commonwealth to establish public schools. While the statute did not expressly exclude Negroes from the schools, the authorization of a tax upon every "white male inhabitant"⁸² implied that Negro education was not contemplated. Kentucky, unlike many slave States, had no prohibition against the instruction of Negroes.⁸³

The permissive school system was made mandatory in 1838. There was an express provision for

⁷⁸ House Journal, 1867, p. 22.

⁷⁹ *Id.*, pp. 60-65.

⁸⁰ Senate Journal, 1867, pp. 62, 63, 64.

⁸¹ Ky. Laws, 1829-30, c. 387.

⁸² *Id.*, sec. 22.

⁸³ Special Report of the U. S. Commissioner of Education (1871), p. 346, House Exec. Docs., 41st Cong., 2d Sess., vol. 13, no. 315.

the allotment of state funds on the basis of the number of white children in the county,"⁸⁴ although the county was still empowered to tax all inhabitants. When the school law was revised in 1864, these provisions were retained.⁸⁵

In 1867, an act "for the benefit of negroes" was passed. This provided for the application of all capitation taxes paid by colored persons, as well as an authorized additional tax of two dollars on each Negro male, to the support of colored paupers and the education of colored children.⁸⁶ With these funds the counties were permitted to establish colored schools towards the support of which the state would also contribute.⁸⁷

The 1870 act "to revise, amend and reduce into one the laws relating to the common schools of Kentucky"⁸⁸ defined a common school as one which every white child between the ages of six and twenty years had the privilege of attending, whether contributing towards defraying its expenses or not (Art. X, sec. 1). No mention was made of colored schools in this law but its language implied that colored pupils were not admitted to the common schools.

A year later there was enacted "an act to cause good school houses to be erected in the 8th and 9th congressional districts."⁸⁹ This stated that it "shall not be construed so as in any way

⁸⁴ Ky. Laws, 1837-38, c. 898, sec. 18.

⁸⁵ Ky. Laws, 1863-64, c. 196.

⁸⁶ Ky. Laws, 1867, c. 1913, secs. 1, 2, 4.

⁸⁷ *Id.*, sec. 6.

⁸⁸ Ky. Laws, 1870, c. 854.

⁸⁹ Ky. Acts, 1871, Vol. 1, c. 1483, p. 51.

to apply to negroes and mulattoes." (Sec. 10.) Similarly, an act regulating the school district of Carrollton in Carroll County provided that only white children were to be admitted to the schools of the district.⁹⁰ Schools for Negroes were provided for in a few towns, e. g., Henderson (1871)⁹¹ and Catlettsburg (1873).⁹²

A uniform system of common schools for colored children was initiated by legislation enacted in 1874.⁹³ This legislation set up a school system similar to that existing for white children. Provision was made for Negroes to elect Negro trustees. A property and personal tax to be levied upon Negroes was imposed. Section 16 of the 1874 act provided

That it shall not be lawful for any colored child to attend a common school provided for white children, nor for a white child to attend a common school provided for colored children.

The Report of the Superintendent of Education for the year ending June 30, 1875, noted the improvement in the status of Negro education:⁹⁴

We have had one year of experiment with our Colored Common School System, and the results have fully justified the wisdom of its inauguration. * * * (p. 105.)

The white system had quite as feeble a beginning as the colored. It is a growth. From a rudimental cell it has developed

⁹⁰ Ky. Acts, 1872, Vol. II, c. 594.

⁹¹ Ky. Acts, 1871, Vol. I, c. 1478, p. 388.

⁹² Ky. Acts, 1873, Vol. II, c. 653, p. 193.

⁹³ Ky. Acts, 1873-74, c. 521.

⁹⁴ Report of the Superintendent of Education, pp. 105, 106, Ky. Doc. 1874-75.

into its present proportions. The lapse of the same number of years will, in the natural growth of sentiment and resources, put the colored system abreast with that of the whites, and every one should be willing, in patience and faith, to wait for the growth of that which cannot be forced by any hot-bed processes (p. 107).

In 1891 Kentucky adopted a constitution, Section 187 of which provided:

In distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained.

LEGAL STATUS OF NEGROES

Negroes were barred from voting in Kentucky,⁹⁵ and excluded from juries.⁹⁶ In February 1866, the legislature passed two laws designed to give the Negro the right to marry one of his own race, and to institute civil and criminal proceedings. However, both laws specifically retained certain discriminations; the one made miscegenation a crime;⁹⁷ the other restricted the Negro's appearance as a witness to civil cases where only Negroes were involved, and to criminal actions in which a Negro was a defendant.⁹⁸ Negroes had previously been allowed to appear as witnesses in all cases brought by the Commonwealth for or against Negroes.⁹⁹

⁹⁵ Ky. Const., 1850, Art. II, sec. 8.

⁹⁶ Ky. Rev. Stats., 1867, c. 55, Art. III, sec. 2.

⁹⁷ Ky. Laws, 1866, c. 556, sec. 3.

⁹⁸ *Id.*, c. 563, sec. 3.

⁹⁹ Ky. Rev. Stats., 1867, c. 107, sec. 1.

LOUISIANA

The Louisiana legislature unanimously rejected the Fourteenth Amendment in February, 1867. In July, 1868, the Reconstruction legislature ratified the Amendment. Public schools were restricted to whites until the adoption of the Constitution of 1868 which expressly prohibited distinction on grounds of race, color or previous condition of servitude. This provision was incorporated in the school law of 1869. The Constitution of 1879 was silent on the subject. The 1898 Constitution expressly required separate schools. Racial distinctions, as well as discriminations, by any public conveyance or place of business were prohibited by the 1868 constitution, and all citizens were declared entitled to the "same civil, political, and public rights and privileges." The Legislature in 1872 memorialized Congress in favor of Senator Sumner's supplementary Civil Rights bill.

RATIFICATION

Louisiana rejected the Fourteenth Amendment in February, 1867, by a unanimous vote of both Houses,¹ despite the recommendation of Governor Wells that it be ratified.² In July, 1868, the amendment was ratified by a vote of 22 to 11 in the Senate and 57 to 3 in the House.³ In the House

Mr. McMillen moved that the resolution be put through its several readings.
Carried,

¹ Senate Journal, 1867, p. 20; House Journal, 1867, p. 23.

² Senate Journal, 1867, p. 5.

³ Senate Journal, 1868, p. 21; House Journal, 1868, p. 8.

On the third reading, the yeas and nays were ordered, and the resolution was adopted by the following vote, as follows—yeas 57, nays 3.⁴

In the Senate there was more delay, but little debate except that Senator Bacon objected to ratification under duress.⁵

SCHOOLS

Prior to 1868, public education was for white children only. For example, the Legislature of 1867 authorized the cities of Baton Rouge and New Orleans to establish schools “for the gratuitous education of the white children residing therein.”⁶

Education (of white children) had been recognized as a public responsibility. The Constitution of 1845 provided that

The legislature shall establish free public schools throughout the State, and shall provide means for their support by taxation on property, or otherwise. (Title VII, Art. 134.)

That of 1852 specified “white children:”

The general assembly shall establish free public schools throughout the State; and shall provide for their support by general taxation on property or otherwise; and all moneys so raised or provided shall be distributed to each parish in proportion to the number of free white children between

⁴ House Journal, 1868, p. 8.

⁵ Senate Journal, 1868, p. 21.

⁶ Louisiana Acts, 1867, No. 34, p. 61; No. 107, p. 203.

such ages as shall be fixed by the general assembly. (Title VIII, Art. 136.)

The 1864 Constitution did not specify:

The legislature shall provide for the education of all children of the State, between the ages of six and eighteen years, by maintenance of free public schools by taxation or otherwise. (Title XI, Art. 141.)

Governor Wells in his message on January 28, 1867, in which he transmitted the Fourteenth Amendment with a recommendation for ratification,⁷ urged education for the freedman. He made no reference to the possible applicability of the Amendment to this question:

* * * I remind you of the claims of the freedman and his family to an equal participation in the benefits to be derived from this beneficent system * * * I regard it as the most important recommendation I can make to you, that an appropriation be made from the school fund for the establishment of colored schools in all the parishes under the general law.⁸

The Reconstruction Constitution of 1868 was specific that all children were to be educated, and went farther to prohibit segregated schools:⁹

ART. 135. The general assembly shall establish at least one free public school in every parish throughout the State, and shall provide for its support by taxation or otherwise. All children of this State be-

⁷ Senate Journal, 1867, p. 5.

⁸ *Id.*, p. 7.

⁹ The Constitution of 1879 (Art. 224) omitted the prohibition on separate schools. That of 1898 required separate schools (Art. 248).

tween the ages of six and twenty-one shall be admitted to the public schools or other institutions of learning sustained or established by the State in common, without distinction of race, color, or previous condition. There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana.

ART. 136. No municipal corporation shall make any rules or regulations contrary to the spirit and intention of article 135.

The prohibition on separate schools in the 1868 Constitution was recommended by the majority of the Committee on Education, but a minority preferred to make no reference to the question.¹⁰ The section on education was referred to the Committee on the Draft of the Constitution, which reported an article which did not refer to separate or mixed schools, but merely provided for education "without prejudice or partiality to any."¹¹ A minority of that committee agreed with the majority of the Committee on Education¹² and their recommendation was adopted by a vote of 61 to 12.¹³ Objections to the proposal for mixed schools as reported contained no reference to the Fourteenth Amendment.¹⁴

The Legislature of 1868 did not enact a public school law, although it contemplated the establishment of free public schools.¹⁵ In 1869 a compre-

¹⁰ Convention Journal, pp. 60-1.

¹¹ *Id.*, p. 94.

¹² *Id.*, pp. 96, 107.

¹³ *Id.*, pp. 200-202, 268-70, 275.

¹⁴ *Id.*, pp. 201, 277, 290, 292.

¹⁵ Louisiana Acts, 1868, No. 162, p. 212.

hensive "Act to Regulate Public Education in the State of Louisiana and to Raise Revenue for the support of the same" was enacted.¹⁶ It contained no reference to color. A revision of the following year¹⁷ specifically mentioned the constitutional requirement:

* * * It shall be the duty of said Board of Education to make a general regulation whereby all schools established under this law, shall be according to the provisions of the Constitution, open to all children of this State between the ages of six and twenty-one years, without distinction of race, color, or previous condition, and in case of failing to pass such regulation, the members of said board shall forfeit the salary allowed them * * * (Sec. 5).

The question of education for Negroes and the further question of mixed schools was discussed without reference to the Fourteenth Amendment.

Governor Warmoth in his annual message for 1869¹⁸ recommended school laws:

It is to be regretted that the last Legislature did not pass some laws on the subject of education. At this time the school system is woefully defective. Outside of the parishes of Orleans and Jefferson public schools have always been a failure, and here at the capital, where it is in its greatest perfection, it is nothing to boast of. * * * There are not school houses enough in the city or State to accommodate half the children, while large numbers are almost totally denied the means of educa-

¹⁶ Louisiana Acts, 1869, No. 121, pp. 175-189.

¹⁷ Louisiana Acts, 1870, Extra Sess., No. 6, pp. 12-30.

¹⁸ Louisiana Legislative Documents, 1869.

tion on account of color. The Legislature should give immediate attention to this subject, and provide means by which every child may receive an education without any distinction * * * ¹⁹

The following year he stated the basis of education for the Negro as arising out of his enfranchisement:

You need no lengthy and labored discussion to impress you with the importance of education. Without it the duties of a citizen are difficult, and we who have enfranchised a race, and have taught that American citizenship is the crowning glory of our Republican institutions, must appreciate that education is the first and most indispensable want of the citizen. Self-protection and self-government alike demand the enlightenment of the masses. The report of the Superintendent of Public Education will show you the impracticable character of the present law. The machinery is cumbersome and expensive * * * ²⁰

In the legislative debates references were made to the fact that in New Orleans colored children were placed in separate and inferior schools. This was condemned as a violation of the state constitution, no mention being made of the Fourteenth Amendment.²¹

The State Superintendent of Public Education discussed the question of mixed schools, again only with reference to the state constitution:

¹⁹ Message, p. 9.

²⁰ Message of Governor Warmoth, Jan. 4, 1870, p. 7, Louisiana Legislative Documents, 1870.

²¹ Louisiana House Debates, 1869, pp. 209-10, 217-20, 246-7.

Than this, there is no subject connected with our system of education on which stronger feeling has been awakened, and none, the influence of which, has been more powerfully felt, as the opinions of the advocates and opponents of the present law have come into collision. Yet upon this point the constitution of the State and the laws passed under it, leave no discretionary power. Our schools, if they exist at all under the constitution, must be open, impartially, to all citizens of the State for the education of their children.

* * * *

I believe that the subject of mixed schools is one which needs no new discussion. A republican State can make no distinction between those who are equally citizens, nor can any humiliating conditions be made in the bestowment of benefits to which all have an equal claim. Yet while standing thus firmly on the principle which underlies the present system, I believe it to be not in the nature of true statesmanship to ignore existing difficulties, nor to underestimate the obstacles which oppose themselves to measures in themselves desirable. In all great changes, whether political or social, where the old order is superseded by new and unfamiliar usages, time is needed for the public mind to adjust itself to the change * * *.

* * * *

* * * For the present, this question will, in most localities, adjust itself if left to the unconstrained choice of those immediately interested; and it is doubtful if that liberty of choice should be interfered with by a forcible attempt to mix the schools in lo-

calities where such action is undesired by any.

Still, the right of any child to admission into any school of the district in which he resides, and to which he is by law entitled, is one that must be enforced. The position I have taken, and on which I shall continue to act in administering the law, is, that "no public schools must be established from which any children are excluded by reason of color."²²

At the end of the year 1870, he reported:

There is, probably, no other State in the Union where the work of popular education, by a system of free schools, is conducted under the disadvantages which are encountered in Louisiana. Not only have we, in common with some sister States, to build the whole system anew, and to do this in the face of that general apathy, rising at times to positive antagonism, which prevails in the Gulf States, but that provision of our Constitution which forbids the establishing of public schools from which any child shall be rejected, on account of race, color or previous condition, excites a determined opposition on the part of many, who would otherwise cooperate in the opening of schools and in the raising of funds for their support.²³

Article 224 of the Constitution of 1879 is silent on the question of race, and apparently permitted

²²Annual Report of the State Superintendent of Public Education for 1869, pp. 11-13, Louisiana Legislative Documents 1870.

²³Annual Report of the State Superintendent of Public Education for the year 1870, p. 28, Louisiana Legislative Documents 1871.

segregation while not requiring it. Article 248 of the Constitution of 1898 made separate schools mandatory.

CIVIL RIGHTS LEGISLATION

In fields other than education the Constitution of 1868 prohibited not merely "discrimination," but also "distinction" based on race or color:

ART. 2. All persons, without regard to race, color, or previous condition, born or naturalized in the United States, and subject to the jurisdiction thereof, and residents of this State for one year, are citizens of this State. The citizens of this State owe allegiance to the United States; and this allegiance is paramount to that which they owe to the State. They shall enjoy the same civil, political, and public rights and privileges, and be subject to the same pains and penalties.

ART. 13. All persons shall enjoy equal rights and privileges upon any conveyance of a public character; and all places of business, or of public resort, or for which a license is required by either State, parish, or municipal authority, shall be deemed places of a public character, and shall be opened to the accommodation and patronage of all persons, without distinction or discrimination on account of race or color.

The legislatures of this period attempted to enforce the non-discrimination provisions of Article 13 of the Constitution. Enforcement acts to prevent discrimination on account of race or color were passed in 1869, 1871, and 1873.²⁴ In addition Congress was requested to adopt Senator

²⁴ Louisiana Acts, 1869, No. 38, p. 37; 1871, No. 23, p. 57; 1873, No. 84, p. 156.

Sumner's supplementary civil rights bill, pending in 1872.²⁵

MAINE

Maine ratified the Fourteenth Amendment in January, 1867. Segregation by law never existed in the public schools of Maine, and the only racial law was an anti-miscegenation statute.

RATIFICATION

Governor Chamberlain, in addressing the Legislature on January 3, 1867, referred to the Fourteenth Amendment as follows:

Imperfect as this was, as hazarding one of the very fruits of our victory by placing it in the power of the South to introduce into the Constitution a disability founded on race and color, still as it was the best wisdom of our Representatives in Congress, and at least a step in the right direction, at the same time that it smoothed the way for the returning South, and especially as it was the declared issue in the recent elections good faith doubtless requires us to support it.²⁶

This same sentiment was voiced in the Senate by at least five Senators, all in favor of adopting the Amendment, and all maintaining that something more was needed.²⁷

²⁵ Louisiana Acts, 1872, No. 1, p. 29.

²⁶ House J., 1867, p. 20.

²⁷ Bangor Daily Whig and Courier, Jan. 17, 1867, p. 2, col. 3; McPherson's *Scrap Book, Fourteenth Amendment*, p. 68 (paper not named).

The House on January 11, 1861, adopted a resolution ratifying the Amendment,²⁸ and the Senate followed on January 16.²⁹

SCHOOLS

Maine's public school laws, enacted under its original Constitution of 1820, do not appear to have made any distinction between colored and white children.

It has been stated that a separate school for Negroes was established in Portland at one time.³⁰

LEGAL STATUS OF NEGROES

The only legislation found concerning Negroes is a miscegenation statute.³¹ This statute continued after the Civil War,³² and was repealed in 1883.³³

MARYLAND

The Maryland legislature rejected the Fourteenth Amendment in January, 1867, following a message from the Governor that its effect would be "the ultimate enforcement of negro suffrage and negro equality." Although before the war there was no prohibition against education of Negroes, as late as 1872 there was no provision for Negro participation in public education, ex-

²⁸ House J., 1867, p. 78.

²⁹ Sen. J., 1867, p. 101.

³⁰ Woodson, *Education of the Negro Prior to 1861* (1915), p. 326, citing Adams, *The Neglected Period of Anti-Slavery in America*, Radcliffe College Monograph No. 14 (1908), p. 142.

³¹ See *Bailey v. Fiske*, 34 Me. 77 (1852).

³² Maine Rev. Stats. 1871, tit. 5, c. 59, § 2.

³³ Maine Laws, 1883, c. 203.

cept in Baltimore. The public school system was established in 1865. That law provided public schools for white children and contemplated the establishment of separate schools for colored children. Maryland's "Black Code" was repealed in 1865 and 1867, but Negroes remained subject to disabilities in respect of voting and jury service.

RATIFICATION

The Maryland legislature in 1867 refused to ratify the Fourteenth Amendment. Governor Swann, in his message of January 4, 1867, urged rejection of the Amendment, in part because it was an attempt "to force equality between the races." He made no reference to education. His message stated in part:

It cannot have escaped notice, that the proposed amendment, comprising five distinct propositions, embodies more than its language would seem to convey, and that the clause, to enforce these provisions, "by appropriate legislation," may leave the Southern and Border States at the mercy of the majority in Congress, in all future time—subversive, as I believe, of every principle of justice and equality among the States, and in times of high party excitement and sectional alienation, dangerous to the liberties of the people.

I assume, without the fear of contradiction, that the effect of this Amendment of the Constitution as a condition precedent to the re-admission of the revolted States, will be the ultimate enforcement of negro suffrage and negro equality, by indirect legislation. * * *

* * * * *

The great obstacle in determining this vexed question of re-construction, is the future status of the negro race.

The Constitutional Amendments mean this and nothing else. The fear of disloyalty is not to be thought of for a moment; and the proposed change in the basis of representation, points to negro suffrage, and the equalization of the races.—There are four millions of negroes to be dealt with. If this element were insignificant or out of the way, there would be no talk of Constitutional Amendments. But the power of the South is to be held in check at least, if not appropriated by the extreme men of the dominant party.

My opposition to any further tampering with the Constitution, proceeds upon the honest belief, that Congress controls all the power needed to protect the country against disloyalty, whatever form it may assume, if any such exists, and that Constitutional Amendments, to force equality between the races, can only result in the ultimate annihilation of the weaker race. Some time ago, the absorbing topic among political agitators, was amalgamation: now it is "manhood suffrage," which means amalgamation, and the power to hold office, without regard to race or color, and every other attribute of perfect equality between the races. This will all do very well for the States of the North, where the colored race have never lived, and cannot be induced to emigrate. With the Southern border States, it is a question of social and political existence. In Maryland the negro would anon hold the balance of power, if in a few years, from the swelling current

of immigration alone, he did not command the numerical ascendency.³⁴

The Joint Committee on Federal Relations reported against ratification.³⁵ With respect to the first section, the report stated:

* * * the Constitution of the United States declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." In the judgment of your Committee it is not safe to confer any additional powers upon Congress touching this subject.

* * * * *

The proposition to vest in Congress the power of supervision, interference and control over State legislation affecting the lives, liberty and property of its citizens and persons subject to its jurisdiction, is virtually to enable Congress to abolish the State governments.³⁶

Ratification was rejected by a vote of 13 to 4 in the Senate³⁷ and 47 to 10 in the House.³⁸

SCHOOLS

In Maryland in 1860, 87,189 Negroes were slaves, and 83,942 were free.³⁹ Although the freedmen were subject to various legal restrictions,

³⁴ House Journal and Documents, 1867, Doc. A, pp. 21-22, 24-25; Senate Journal and Documents, 1867, Doc. A.

³⁵ Maryland Laws, 1867, pp. 879-911.

³⁶ *Id.*, pp. 893-894.

³⁷ Senate Journal, 1867, p. 808.

³⁸ House Journal, 1867, p. 1141.

³⁹ Special Report of the Commissioner of Education (1871), p. 352.

there had been no prohibition on their education, and at least one school for the children of freedmen had been in existence since 1835.⁴⁰

The first public school law was enacted in 1865.⁴¹ It provided for a system of free public schools for white children only:

In every school district in each city and county established as hereinbefore provided, there shall be kept for at least six months, in each year, one or more schools according to population, which shall be free to all white youth over six and under nineteen years of age.⁴²

* * * * *

All white youth between the ages of six and nineteen years, are entitled to free instruction in any of the public schools of the State * * *.⁴³

It also envisaged the establishment of schools for colored children:

The total amount of taxes paid for school purposes by the colored people of any county and the city of Baltimore, together with any donations that may be made, shall be set aside for the purpose of founding schools for colored children, which schools shall be established under the direction of the School Commissioners, and shall be subject to such rules and regulations as the Board of Education shall prescribe.⁴⁴

A revision in 1868 contained similar provisions.⁴⁵

⁴⁰ *Id.*, p. 353.

⁴¹ Maryland Laws, 1865, C. 160, pp. 269-301.

⁴² *Id.*, p. 282.

⁴³ *Id.*, p. 285.

⁴⁴ *Id.*, pp. 295-296.

⁴⁵ Maryland Laws, 1868, C. 407, pp. 745-68.

At the 1867 session of the legislature the Superintendent of Public Instruction submitted his First Annual Report for the year ending June 30, 1866.⁴⁶ He recommended education for Negroes as "the duty and interest of the State":

* * * I believe it to be the duty and interest of the State to provide opportunities of education for all who live within her borders; and therefore repeat the recommendation, that separate schools for colored children to be under the control of the School Commissioners, be established in every district where 30 or more pupils will regularly attend.

While nothing has yet been done for this class by the State, it is gratifying to know that the colored people, appreciating the advantages of education, are doing what they can for themselves, aided by liberal contributions from benevolent individuals, and the Baltimore Association. (Report, p. 64.)

In Governor Swann's message of January 15, 1868,⁴⁷ he regarded the success of the Democrats in the 1867 State elections as a repudiation of the Congressional plan of reconstruction. In the section of his message dealing with the topic, "Negro Suffrage and Negro Equality—Territorial Government for Maryland," he said in part that

* * * The white man can never be educated to believe that the Negro is his equal, nor can he be persuaded, unless warped in his heretofore fixed impressions, that the

⁴⁶ House Journal and Documents, 1867, Doc. K.

⁴⁷ House Document A, Maryland Documents, 1868.

two races can be brought together in political or social fraternization, upon terms of equality, without degradation to his own * * *

Our obligation to clothe the Negro with the full privileges of citizenship cannot be claimed upon any reasonable ground, either of justice or humanity. "Equality before the Law" and "Manhood Suffrage," are phrases, in no wise applicable to us whose misfortune it has been to deal with a distinct and peculiar people, whose intrusion into our midst was the result of agencies which imposed no obligation beyond that which affected the rights of person and property, which the Negro is now enjoying to the fullest extent under our laws. This Government was never intended by its founders to be shared by the African race; it was no part of our compact of Union. It was a white man's government exclusively. The liberty to exercise the right of suffrage and to hold office was a function of the Government intended to be parted with or not, as the people in the aggregate might determine, in the mode pointed out in their organic law. * * * (pp. 18-19).

* * * * *

The change which has been wrought by the verdict of the people in the late elections, certain to be followed by more overwhelming expressions of the public sentiment, will enable us to deal more advisedly hereafter with this Negro issue; and will point to enlarged educational facilities, and the security of person and property, in lieu of amalgamation and forced equality with the white race, as the only privileges which in justice to themselves, as well as the peaceful working of our system, can be ad-

vantageously conferred upon the Negro race * * * (p. 22).

The Second Annual Report of the State Superintendent of Public Instruction (1868),⁴⁸ stated that

No public organized plans have been adopted for the education of this class of children, except in the city of Baltimore. As reported last year, schools have been continued in the counties under the direction of the Baltimore Association for the moral and mental improvement of colored persons, supported by contributions from benevolent associations, and the payment of tuition fees by the parents or friends of the children educated.

* * * * *

The Schools for colored people in the city of Baltimore were adopted by the City Council in September 1867, and are now conducted under the supervision of the City School Commissioners.

* * * * *

Whatever prejudice may have existed in the minds of some of our citizens on this subject, is rapidly disappearing, and I think it may be asserted that while there is not at present a willingness to educate colored children at the public expense, there is a readiness to grant them such facilities and encouragements as will not prove a burden upon the resources of the State (pp. 42-43).

He then quoted the following from the report of Dr. S. A. Harrison of Talbot County:

⁴⁸ Maryland Documents, 1868, No. W.

"The question suggests itself, can and should anything be done by the County or State for the support of these schools? * * * Emancipation accomplished, education must follow or society suffers. In slavery the master stood in the relation of parent to his slaves. The State must now assume that relation. They are now children of the State, but children who will rend and tear their own mother if not properly educated * * *" (p. 44).

The Maryland Legislature next met in 1870, after the Fourteenth Amendment had become a part of the Constitution. Governor Bowie in his annual message recommended modifications in the school law. As to colored schools, he said the following:

If at a period, immediate or remote, [the freed men] are to become citizens, possessed of the elective franchise, would not sound policy, then, dictate such education of the colored population as would prepare them intelligently to exercise the elective franchise, and as citizens to judge for themselves of the proper workings of our political system, and not be misled by the crafts and clamors of designing and unscrupulous politicians? Education among the colored people of the State would have a beneficial effect in rendering them more valuable in any position they may be destined to fill. It would doubtless render them, as a class, more virtuous and provident, and better members of the community in which they live. * * *"

In the 1870 Annual Report on the condition

" House Document A, January 20, 1870, pp. 14-15.

of the public schools,⁵⁰ the reason for educating colored children was given as follows:

It is evident that if the colored people are to be educated by the State, some more effective measure must be adopted. And in view of all the circumstances of the case, I do not believe that the counties can do a better or a wiser thing than to follow the example of Baltimore City, in educating the colored children in separate schools, but under the same general laws and superintendence as the white children. True, this will cost some money, but will it not cost more to educate them for the penitentiary and in it? (pp. 17-18).

The annual message of Governor Bowie in 1872 referred to the subject of Negro education as follows:

The total amount of school taxes paid by the colored people, is set aside for the support of colored schools; but this amount is so small as to be practically worthless. Even when supplemented by additional donations from the school funds, it did not reach, in 1870, the sum of five thousand dollars. The kind and generous feeling entertained in this State for the colored race, who have been reared among us, and who, in their changed condition of circumstances, have conducted themselves, as a rule, with marked propriety, will dictate that the opportunity of at least a rudimental education should be offered them.⁵¹

In another part of the message he stated that the Ku Klux Act⁵² was not authorized under the

⁵⁰ House Document G, January 1870.

⁵¹ Md. Docs., 1872, House Doc. B, p. 12.

⁵² 17 Stat. 13.

Fourteenth Amendment,⁵³ but he made no reference to the Amendment in connection with education.

The Board of State School Commissioners in discussing education for Negroes in 1872 did so without reference to the Fourteenth Amendment:⁵⁴

There are no arguments in favor of the education of the people that do not apply with equal or greater force to the education of colored people, now that they are free, and are by Law entitled to the elective franchise. Every consideration of public policy, of philanthropy, and of justice demands that a beginning should be made in this direction as soon as the finances of the State will permit.

In April, 1872, the county school commissioners were required by statute to establish colored schools "provided the average attendance be not less than fifteen scholars;" such schools were to be supported by special appropriations as well as by all school taxes paid by Negroes.⁵⁵

LEGAL STATUS OF NEGROES

Before the Civil War Maryland had had a "Black Code." Manumission was prohibited;⁵⁶ slaves might be brought into the state, but not free Negroes, other than personal servants;⁵⁷ strict regulations controlled meetings of Negroes,

⁵³ Md. Docs., 1872, House Doc. B, pp. 65-80.

⁵⁴ Report of the Board of State School Commissioners, House Doc. V, p. 12 (March 1872).

⁵⁵ Md. Laws, 1872, c. 377, c. 18.

⁵⁶ Md. Code, 1860, art. 66, sec. 42.

⁵⁷ *Id.*, sec. 2, 44 *et seq.*

and the circulation of abolition papers was prohibited.⁵⁸ There were special provisions relating to criminal offenses, contracts, and employment.⁵⁹ Negroes could not appear as witnesses in cases involving white persons.⁶⁰

During the war and shortly thereafter most of these restrictions were removed. The provision against manumission went in 1864.⁶¹ In 1865 and 1867, the entire part of the Civil Code dealing with Negroes, except for one section, was repealed.⁶² The special provisions of the criminal law applicable to Negroes were also eliminated in 1867.⁶³

Remaining in force, however, were the denial of suffrage,⁶⁴ and exclusion from juries.⁶⁵ The law against miscegenation, carrying stringent penalties, was repealed in 1867,⁶⁶ but in 1884, it was again made a crime punishable by imprisonment.⁶⁷

MASSACHUSETTS

Massachusetts ratified the Fourteenth Amendment in March, 1867, over the opposition of a minority which objected mainly to the provisions of section 2. Prior to 1855, there was no provi-

⁵⁸ *Id.*, sec. 58 *et seq.*

⁵⁹ See, generally, art. 66 of the Code, and art. 30 (crimes).

⁶⁰ Md. Code, 1860, art. 37, sec. 1.

⁶¹ Md. Laws, 1864, c. 105.

⁶² Md. Laws, 1865, c. 166; 1867, c. 54.

⁶³ Md. Laws, 1867, c. 10, 64.

⁶⁴ Md. Const., 1867, art. I, sec. 1.

⁶⁵ Md. Laws, 1867, c. 329. There does not seem to have been any explicit statutory prohibition before this.

⁶⁶ Md. Laws, 1867, c. 64.

⁶⁷ Md. Laws, 1884, c. 264.

sion in the Massachusetts school laws referring to race or color, but schools for colored children were established in some cities. In 1845 a law was enacted giving a right of action to children unlawfully excluded from any public school. In *Roberts v. City of Boston*, 5 Cush. 198 (1850), the Supreme Court of the state declared that school segregation did not violate the equality before the law which was guaranteed by the Massachusetts Constitution. The Legislature in 1855 prohibited any racial distinctions in the admission of pupils to the public schools. Negroes always had the right to vote.

RATIFICATION

Massachusetts ratified the Fourteenth Amendment in March, 1867. Governor Bullock recommended ratification in his Inaugural Address of January 4, 1867, and at the same time advocated universal suffrage. He said:

* * * Prominent among the provisions of this Article of amendment, I notice great principles of government, long recognized by the people of this Commonwealth, and endeared to them by the sanctions of their own history and usage.

The first section guarantees to all persons born or naturalized in the United States, and subject to its jurisdiction, the right of citizenship and of civil equality before the law; and it protects them from any State legislation which might abridge their privileges, or deprive them of life, liberty or property, without due legal process. To this cardinal principle of a republican government I am unable to see how any citizen can reasonably object, who is himself in

sincerity of belief a supporter of the Democratic idea. As an abstract proposition, it is so manifestly an axiom of free government as to preclude the necessity of argument. In its special application to the condition of the insurgent States, its adoption by Congress was designed to give certain and enduring effect to the provisions of the Act, commonly called the Civil Rights Bill, passed at its last session, by the constitutional majority, notwithstanding the objections of the President. Whatever reasons existed at the time for the enactment of that bill, apply with redoubled force to the incorporation of its provisions into the organic law. The denial of its benefits and immunities to a large class of citizens in those States, rendering emancipation to a great extent a nullity, now demands its affirmation in the most solemn form, to the end that neither the Executive nor the judicial power, nor the local authorities, may render inoperative the deliberate verdict of the people.⁶⁸

After discussing the other sections of the Amendment, the Governor stressed the need for Congressional action for the reconstruction of the Southern states. Such reconstruction could not be successful, he stated, unless complete justice was done to the Negroes through the grant of suffrage. No educational requirement such as was incorporated in the Constitution of Massachusetts should be attached to the franchise in the South:

To the colored race, held in ignorance by local laws in regions where district schools

⁶⁸ Mass. Acts and Resolves, 1867, pp. 820-821.

are unknown and public education scarcely exists in any form, with the law and the purse in the hands of determined opponents, suffrage thus limited would be practically unattainable.

Unrestricted franchise would be the surest method of securing education for the Negroes in the Southern states.⁶⁹

The Amendment was referred to the House Committee on Federal Relations,⁷⁰ which reported on February 28.⁷¹ The majority submitted an extensive discussion, with the conclusion

that no exigency exists requiring immediate action upon an amendment open to the grave objections we have presented.⁷²

They recommended that the matter be referred to the next legislature. The principal criticisms were directed against the second section. It was said that this perpetuated the "outrage" of Negro disfranchisement.⁷³

As to the first section of the Amendment, the majority found that

It is difficult to see how these provisions differ from those now existing in the Constitution * * *.

* * * The last clause, no State shall "deny to any person within its jurisdiction the equal protection of its laws," though not found in these precise words in the Constitution, is inevitably inferable from its whole scope and true interpretation.

⁶⁹ *Id.*, p. 826.

⁷⁰ Jan. 5, 1867. House J., 1867, p. 12.

⁷¹ Mass. House Doc., 1867, No. 149.

^{71a} *Id.*, pp. 5-9, 17.

⁷² *Id.*, p. 24.

The denial by any State to any person within its jurisdiction, of the equal protection of the laws, would be a flagrant perversion of the guarantees of personal rights which we have quoted. If it should be said that such denial has existed heretofore in spite of these guarantees, we answer that such denial would be equally possible and probable hereafter, in spite of an indefinite reiteration of these guarantees by new amendments.

We are brought to the conclusion, therefore, that this first section is, at best, mere surplusage; and that it is mischievous, inasmuch as it is an admission, either that the same guarantees do not exist in the present Constitution, or that if they are there, they have been disregarded, and by long usage or acquiescence, this disregard has hardened into constitutional right; and no security can be given that similar guarantees will not be disregarded hereafter.⁷³

Section 5 of the Amendment, the majority stated, "will not enlarge, nor its rejection curtail, the powers now conferred upon Congress by the Constitution."⁷⁴

The minority recommended ratification, describing the Amendment as an extremely important "measure of support to loyal men, and of protection to the property of the country":

* * * As a declaration of the true intent and meaning of American citizenship, it appeals to freemen everywhere. And while it cannot be considered as a finality in the work of reconstructing our federal

⁷³ *Id.*, pp. 2-4.

⁷⁴ *Id.*, p. 16.

government, it is an advance in the direction of establishing unrestricted popular rights, which, when completed, will make our Constitution and laws accordant with the highest principles of free civil organization.⁷⁵

The Report was debated in the House on March 12, 13, and 15.⁷⁶ Mr. Mason proposed to substitute the minority report for the majority report. He "did not believe that the rights of the colored man would be injured by its adoption." The people of the state were in favor of ratification; their representatives in Congress had voted for it, and the voters had sent them back to Washington satisfied with their action. Mr. Walker, in opposition, asked the legislature to consider where the country would be led by a provision "that carries undisguised on its face something that makes possible the introduction of serfdom in a country claiming to be republican." Referring to the Declaration of Independence and the Preamble to the Constitution, he said that all men who loved justice could readily assent to the Amendment were it not for the second section. Mr. Howe favored ratification because the Amendment "was a part of a grand scheme for the reconstruction of the South."⁷⁷

On March 13, Mr. Dana spoke in favor of ratification. Section 1, he said, was

a most important article; by it the question of equal rights was taken from the Supreme Courts of the States and given to

⁷⁵ *Id.*, p. 25.

⁷⁶ Summaries of the debates are found in the *Boston Daily Advertiser* of March 13 to 16, and March 21, 1867.

⁷⁷ *Boston Daily Advertiser*, March 13, p. 4.

the Supreme Court of the United States for decision; the adoption of this article was the greatest movement that the country had made towards centralization and was a serious and most important step. This was taken solely for the reason of obtaining protection for the colored people of the South; the white men who do not need this article and do not like it, sacrifice some of their rights for the purpose of aiding the blacks.⁷⁸

Mr. Avery opposed ratification because he felt that the Constitution was well enough as it stood; this was no time to make a grave change in the organic law. By the first section, Massachusetts, as well as other States, "was ousted from her protective jurisdiction"; by its adoption, all rights, civil and criminal, would be transferred from State courts to federal courts; in fact, all states' rights were taken away.⁷⁹

The minority report for ratification was adopted by a vote of 120 to 22.⁸⁰ On March 15, after some further debate, the House voted for ratification, 120 to 20.⁸¹

In the Senate there was a brief debate on March 20, in which Senator Ball condemned any compromises "with sin or rebellion."⁸² The vote, taken on the same day, was 27 to 6 in favor of ratification.⁸³

⁷⁸ *Id.*, March 14, p. 4.

⁷⁹ *Ibid.*

⁸⁰ House J., 1867, p. 207.

⁸¹ Mass. Acts and Resolves, 1867, p. 787; McPherson, *Reconstruction*, p. 194.

⁸² *Boston Daily Advertiser*, March 21, p. 1.

⁸³ Mass. Acts and Resolves, 1867, p. 787; McPherson, *Reconstruction*, p. 194.

The school laws of Massachusetts in the early part of the 19th century provided that the schools were to be "for the benefit of all the inhabitants of the town."⁸⁴ About 1820 the school committees in several towns, acting under their general authority to supervise the schools and determine the qualifications of pupils, established separate schools for colored children.⁸⁵ Shortly thereafter strong pressure was brought through petitions to the school committees to end segregation, and by 1845 this was accomplished in every town except Boston.⁸⁶ Little or no trouble was reported.⁸⁷

In 1844, a petition was presented to the Boston School Committee to end segregation in the public schools. The Committee, with the support of the City Solicitor, refused to change its position.⁸⁸ The minority of the Committee filed a dissent:⁸⁹

It is the peculiar advantage of our republican system, that it confers civil equality and legal rights upon every citizen—that it knows no privileged class, and no degraded class—that it confers no distinction, and creates no difference * * * (p. 4).

⁸⁴ See Mass. Rev. Stats., 1836, Pt. I, Tit. 10, c. 23, sec. 5.

⁸⁵ Woodson, *The Education of the Negro prior to 1861* (1915), p. 320.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* See also the letters printed in Report of the Minority of the Committee of the Primary School Board on The Caste Schools of the City of Boston (pamphlet, 1846).

⁸⁸ Woodson, *op. cit.*, p. 321.

⁸⁹ Report of the Minority, etc., p. 10, cited in note 87, *supra*.

The whole argument may be stated thus. The colored man, as any other citizen, has the right to send his child to the nearest school, subject only to restrictions for good and lawful reasons. But his race or his color is an unlawful and inhuman reason for restraining his right of choice; for our constitution and laws have everywhere repudiated all distinctions of citizens into classes, on this, or any other ground, and have pronounced all possible reasoning in support or justification of such distinctions insufficient and dangerous (p. 7).

However, the minority made the following reservation:

When we deny that it is as advantageous for the colored children to attend the separate schools, as it would be, to be educated with the white children, we do not mean to be understood, that under other circumstances than exist here, they might not receive equal educational advantages from separate schools—but under the circumstances which do exist, we do deny, that they can receive equal benefit from separate which they would from the common schools. They are a small minority, less than two per cent of our city population. * * * (p. 10).

In 1845 the legislature passed a law providing that

* * * Any child unlawfully excluded from public school instruction in this Commonwealth, shall recover damages therefor, in an action on the case * * * in any court of competent jurisdiction to try the same,

against the city or town in which such public school instruction is supported.⁹⁰

The Senate committee which reported the measure stated that it resulted from petitions "for some remedy in the school law, that will extend to all children the same educational rights."⁹¹

In *Roberts v. City of Boston*, 5 Cush. 198 (1850), suit was brought against the City of Boston, under the 1845 law, for damages resulting from exclusion of a Negro pupil from a white school. The attorneys for the plaintiff, one of whom was Charles Sumner, argued that racial separation in the schools violated the principle of equality before the law, which was a part of "the spirit of American institutions, and especially of the constitution of Massachusetts" (p. 201).

The decision of the court, however, upheld the action of the city and suggested that the remedy was through legislation.

Legislative action followed in 1855. In that year the House committee, to which petitions seeking an

⁹⁰ Mass. Acts and Resolves 1845, c. 214.

⁹¹ Mass. Legis. Docs. 1845, Sen. No. 42. The law, according to Henry Wilson, who was one of its supporters, was one of the results of the abolitionist campaign for the admission of colored children to all schools without distinction. (Wilson, *History of the Rise and Fall of the Slave Power in America* (1872), pp. 496-98). In *Sherman v. Inhabitants of Charlestown*, 8 Cush. 160 (1851), Chief Justice Shaw said that it was probably passed in consequence of the court's decision in *Spear v. Cummings*, 23 Pick. 224 (1839), which had held that no action could lie where a child claimed to have been unlawfully excluded from a school. The report of the *Spear* case does not indicate the reason for exclusion.

end to segregation had been referred, reported out a bill to that effect, stating:

Your committee have been unable to find from an examination of the Constitution, states, or regulations pertaining to schools, any specific authority on the part of superintendents or committee men to exclude, by reason of color, race, or religious opinions, any portion of the children of the State from the benefits of common school education.⁹²

While the Committee "fully recognize[d] the weight and influence" of the opinion in the *Roberts Case*, it adopted the following view contained in an earlier opinion of the City Solicitor of Salem:

"It may be said that the free school, provided exclusively for colored children, is equally advantageous to them. I think it would be easy to show that this is not the case. But suppose it were so, it would in no way affect the decision of the question. The colored children are lawfully entitled to the benefit of the free schools, and are not bound to accept an equivalent. * * * 77 93

The Legislature amended the 1845 Act by adding as Section One the following:

In determining the qualifications of scholars to be admitted into any public school or any district school in this Commonwealth, no distinction shall be made on account of the race, color or religious opinions, of the applicant or scholar.⁹⁴

⁹² Mass., Legislative Documents, 1855, House No. 167, p. 2.

⁹³ *Id.*, p. 5.

⁹⁴ Mass. Acts and Resolves, 1855, ch. 256.

LEGAL STATUS OF NEGROES

Massachusetts never excluded Negroes from voting.⁹⁶ In 1843 the miscegenation statute was repealed.⁹⁷

MICHIGAN

The Fourteenth Amendment was ratified by Michigan in January 1867. In that year, the legislature provided for all children "an equal right to attend any school * * *." At this time Negroes could not vote in general elections nor serve as jurors. These restrictions were removed by 1870. In 1890, the Supreme Court of Michigan declared the "separate but equal" doctrine invalid under the common law, with respect to public accommodations and services. *Ferguson v. Gies*, 82 Mich. 358.

RATIFICATION

Governor Crapo submitted the Fourteenth Amendment to the Legislature on January 7, 1867, expressing a desire for unanimous ratification.⁹⁷ The Senate voted to ratify, 25 to 1; ⁹⁸ the House, by a vote of 77 to 15, adopted the Senate proposal, with a slight modification in the procedural provisions to be followed,⁹⁹ and the change was accepted by the Senate.¹

⁹⁶ See Mass. Laws and Resolves, 1781, c. 25; Mass. General Statutes, 1860, c. 6, sec. 1.

⁹⁶ Mass. Acts and Resolves, 1843, c. 5.

⁹⁷ Sen. J., 1867, p. 34.

⁹⁸ *Id.*, p. 125 (Jan. 15).

⁹⁹ House J., 1867, pp. 181-82 (Jan. 16).

¹ Sen. J., 1867, p. 162 (Jan. 17).

SCHOOLS

Free tax-supported schools were first established in Michigan while it was a territory.² In the years following this was replaced by a tuition system.³ The Constitution of 1850 stated that beginning in 1855 schooling was to be free,⁴ but this was not effected until 1869.⁵ In the meantime, tax-supported schools in Detroit alone, established in 1842, continued in operation.⁶

In 1841 the Legislature authorized a separate school district in Detroit, not geographically described, but consisting of the city's colored children, who were thus excluded from the census of the other school districts in the city.⁷ In 1842 a single district for the city was created but the Board of Education was given

full power and authority * * * relative to anything whatever that may advance the interest of education, the good government and prosperity of common schools in said city and the public welfare concerning the same.⁸

In 1867, the Legislature declared that

All residents of any district shall have an equal right to attend any school therein: *Provided*, that this shall not prevent the grading of schools according to the intel-

² Mich. Terr. Laws, Vol. II, 1827, p. 472.

³ See Pierce, *Historical Sketches of Education in Michigan* (1881), pp. 23-24.

⁴ Art. XIII, Sec. 4.

⁵ Mich. Laws, 1869, Act No. 110.

⁶ Mich. Laws, 1869, Act. No. 233.

⁷ Mich. Laws, 1841, Act No. 29.

⁸ Mich. Laws, 1842, Act No. 70.

lectual progress of the pupils, to be taught in separate places when deemed expedient.⁹

In *People v. Board of Education*, 18 Mich. 400 (1869), the court held that this Act superseded the provision of the Detroit charter concerning segregation. In other districts the state school Superintendent reported in 1868 that "we have wiped caste from our school laws."¹⁰

LEGAL STATUS OF NEGROES

The original constitution under which Michigan was admitted to the Union in 1836 provided suffrage for white males only.¹¹ This requirement remained until 1870, when it was eliminated by the Legislature, a month after it ratified the Fifteenth Amendment.¹² While the 1836 provision was in force it also barred Negroes from juries.¹³ Negroes never appear to have been disqualified as witnesses.

Marriage between whites and Negroes was prohibited at the time of the adoption of the Fourteenth Amendment.¹⁴ In 1883, this prohibition was eliminated.¹⁵

In *Ferguson v. Gies*, 82 Mich. 358 (1890), the state Supreme Court rejected the "separate but equal" doctrine in so far as public accommodations and services were involved. The case arose from the refusal of a restaurant owner to serve

⁹ Mich. Laws, 1867, Act No. 34.

¹⁰ See Report of the Superintendent of Public Instruction of Indiana for 1867-68, p. 26. Indiana Documents, 1867-68.

¹¹ Mich. Const., 1836, Art. II, Sec. 1.

¹² Mich. Laws, 1869, Jt. Res. No. 42, p. 425 (Apr. 5).

¹³ Mich. Comp. Laws, 1857, Tit. 29, C. 128, Sec. 9; Tit. 39, C. 196, Sec. 1.

¹⁴ Mich. Rev. Stats., 1846, C. 83, Sec. 6.

¹⁵ Mich. Pub. Acts, 1883, Act No. 23.

the Negro plaintiff at a table reserved for whites, although service in another part of the room was afforded. The trial judge had charged:

While the defendant had no right to make a rule providing for an unjust discrimination, still he would have the right, under the law, to make proper and reasonable rules for the conduct of his business, and governing the conduct of his patrons; and whether this was a reasonable rule I will submit to you for determination. * * * By this term "full and equal" is not meant identical accommodations, but by it is meant substantially the same accommodation (p. 362).

The court held:

The fault of this instruction is that it permits a discrimination on account of color alone, which cannot be made under the law with any justice (pp. 362-363).

The court held that the Michigan statute, enacted in 1885,¹⁶ prohibiting the denial of "full and equal" privileges of inns, restaurants, eating houses, barber shops, public conveyances and theaters to any citizen, was only declaratory of the common law of the state; that prior to the time when Negroes were made citizens of the state, a discrimination such as that in the case at bar against a white citizen would have given him a claim for damages, and that the Negro had gained a similar right on becoming a citizen.

MINNESOTA

The Minnesota legislature ratified the Fourteenth Amendment in January, 1867. The public

¹⁶ Mich. Pub. Acts, 1885, Act No. 130.

schools had always been open to Negroes. In 1867 Negroes were barred from voting or serving as jurors. These restrictions were removed by the adoption of a constitutional amendment in November, 1868.

RATIFICATION

The Governor addressed the Minnesota legislature on January 10, 1867. After asking for universal suffrage in the state, and expressing the hope that it would soon be adopted throughout the Nation, he submitted the Fourteenth Amendment:

I recommend to you [its] prompt adoption.

It secures to all citizens of the United States equal civil rights—it apportions representation in Congress and the electoral college equally among the States, according to the number of persons enjoying political rights. * * *

In the event of their [the Southern states'] refusal to accept the amendment it may become the duty of Congress to reorganize their civil governments on the basis of equal political and civil rights to all men, without distinction of color, and thus to devolve upon the now disfranchised loyal people of the south the work of national reintegration.¹⁷

The next day, the House adopted a resolution for ratification by a vote of 40 to 5.¹⁸ The Senate the following day adopted the resolution for ratification by a vote of 16 to 5.¹⁹

¹⁷ Address of Governor, pp. 25-26, Minn., Exec. Docs., 1866.

¹⁸ House J., 1867, pp. 34-25.

¹⁹ Sen. J., 1867, pp. 22-23.

SCHOOLS

The Minnesota public school law of 1864 provided that

* * * if any child of suitable age is denied admission, or any scholar expelled without sufficient cause, or on account of color, social position, or nationality, the teacher so offending or board of trustees [of the district shall be fined].²⁰

The territorial statutes of 1851 contained no provision distinguishing between races with respect to schools.²¹

In reply to a questionnaire from the Superintendent of Public Instruction of Indiana, the Minnesota Superintendent of Schools wrote in 1868:

Colored people vote. They send their children to school, who have all the rights, privileges and immunities of white children. They are excluded from no educational rights. They are just as the white children in their opportunities.²²

LEGAL STATUS OF NEGROES

Under Article VII, section 1, of the Constitution of 1857 the franchise was limited to white males and Indian males who had accepted the "language, customs and habits of civilization." Proposed amendments to remove the racial bar

²⁰ Minn. Gen. Laws, 1864, c. 4, sec. 1.

²¹ See Minn. Terr., Rev. Stat., 1851, c. 29.

²² See Report of the Superintendent of Public Instruction of Indiana for 1867-68, p. 27. Ind. Doc., 1867-68.

were rejected in 1865,²³ and again in 1867.²⁴ The amendment was finally adopted in the elections of November 1868, and it was promulgated January 9, 1869.

During the period that the Negro was barred from voting, he was similarly barred from acting as a juror.²⁵ There does not seem to have been at any time a law against miscegenation. In 1885, Minnesota enacted a Civil Rights Act prohibiting any discrimination against Negroes in public places, or by common carriers.²⁶

MISSISSIPPI

In January 1870 Mississippi ratified without debate the Fourteenth Amendment, which it had rejected unanimously in each House in January 1867. Its Constitution of 1868 was silent on the question of separate schools. All legislation until 1876 seems to have contemplated mixed schools. In that year, segregation was permitted, and in 1878 was required. An 1870 statute repealed all color discriminations in the laws of the state.

RATIFICATION

Mississippi rejected the Fourteenth Amendment in January 1867, by a unanimous vote of

²³ Oberholtzer, *A History of the United States Since the Civil War* (1917), p. 140, n. 2.

²⁴ *Id.* at p. 479.

²⁵ Minn., Gen. Stats., 1866, c. 8, tit. 3, sec. 98.

²⁶ Minn., Gen. Laws, 1885, c. 224.

both houses.²⁷ Governor Humphreys, in his Message of October 16, 1866, had urged rejection, saying:

The Radical Congress has enacted laws and proposed amendments to the Constitution, which if adopted will destroy the rights of the States and of the people, and centralize all the powers of government in the Federal Head.

* * * * *

This amendment, adopted by a Congress of less than three-fourths of the States of the Union, in palpable violation of the rights of more than one-fourth of the States, is such an insulting outrage and denial of the equal rights of so many of our worthiest citizens who have shed lustre and glory upon our section and our race, both in the forum and in the field, such a gross usurpation of the rights of the State, and such a centralization of power in the Federal Government, that I presume, a mere reading of it, will cause its rejection by you.²⁸

The Report of the Joint Standing Committee on State and Federal Relations²⁹ objected to the Amendment for various reasons, including that

* * * It transfers to the United States a criminal and police regulation over the inhabitants of the States touching matters purely domestic. It intervenes between the State Government and its inhabitants on the assumption that there is an alienation

²⁷ Mississippi Laws, 1866-67, p. 734; Senate Journal, 1866-67, p. 196; House Journal, 1866-67, p. 201.

²⁸ House Journal, 1866-67, pp. 7, 8.

²⁹ *Id.*, App., pp. 77-87.

of interest and sentiment between certain portions of the population. And that such intervention is for the benefit of one class against the other.⁸⁰

Further,

* * * the object is, to compel the Southern States to accept negro suffrage * * * It cannot be pretended that the lately enfranchised blacks are, as a body, either morally or intellectually competent to vote.⁸¹

Former Governor Sharkey also outlined his objections in a letter to Governor Humphreys, dated September 17, 1866, saying in part

But let us look, for a moment, at the provisions of the proposed amendment. The first section * * * does not say what are privileges and immunities; that is left for the next Congress to provide in virtue of the last section, which declares "that Congress shall have power to enforce, by appropriate legislation, the provisions of this article." We may find Congress conferring "privileges and immunities" on one class to the exclusion of another class; or we may find Congress assuming absolute control over all the people of a State and their domestic concerns, and this virtually abolishes the State.

* * * * *

I need say nothing of the fourth section, but the fifth is the Trojan horse abounding in mischief. It provides that "Congress shall have the power to enforce, by appropriate legislation, the provision of this

⁸⁰ *Id.*, p. 79.

⁸¹ *Id.*, pp. 79, 80.

article," which may be construed to authorize Congress to do whatever it may desire to do. Un[der] this same provision, attached to the emancipation amendment, you have the Civil Rights bill and the Freedmen's Bureau bill. It was construed in the Senate, just as I admonished many members of the Legislature it would be, to authorize these odious measures. We should profit by the experience it has furnished us.

* * * I will only add, that should this amendment become part of the Constitution, we shall have a very different government from that which we inherited from our ancestors.²²

Three years later, in January, 1870, Mississippi ratified the Amendment without debate or comment.²³

SCHOOLS

The Mississippi Constitution of 1868 did not specify whether the public schools were to be separate or mixed:

As the stability of a republican form of government depends mainly upon the intelligence and virtue of the people, it shall be the duty of the legislature to encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement, by establishing a uniform system of free public schools, by taxation or otherwise, for all children between the ages of five and twenty-one years, and

²² McPherson's *Scrap Book, Fourteenth Amendment*, pp. 22-23.

²³ Mississippi Laws, 1870, p. 631; Senate Journal, 1870, p. 19; House Journal, 1870, p. 20.

shall, as soon as practicable, establish schools of higher grade. (VIII, 1.)

A public school or schools shall be maintained in each school-district at least four months in each year * * *. (VIII, 5.)

The Bill of Rights (Article I) contained the following provision:

SEC. 21. No public money or moneys shall be appropriated for any charitable or other public institutions in this State making any distinction among the citizens thereof, *Provided*, That nothing herein contained shall be so construed as to prevent the legislature from appropriating the school-fund in accordance with the article in this constitution relating to public schools.

Attempts to put into the article on education a requirement of separate schools were defeated,³⁴ as was a proposal to have the Convention adopt an ordinance providing for separate schools.³⁵

The Legislature of 1870 passed "An Act to Regulate the Supervision, Organization, and Maintenance of a Uniform System of Public Education for the State of Mississippi,"³⁶ which contained no reference to color. Governor Alcorn, in his Inaugural Address in March, 1870, had emphasized the importance of educating both white and colored children:

The new system has its work still further increased by the benevolence of its spirit. The poor white children of the State, who were permitted in the past to grow up like

³⁴ Constitutional Convention Journal, pp. 316, 318.

³⁵ *Id.*, p. 479-80.

³⁶ Mississippi Laws, 1870, ch. 1, pp. 1-18.

wild flowers, without training, the administration which we are about to inaugurate to-day is determined to expend a large proportion of its energies in educating. And so, also, will the government which reigns over us from this hour devote a large proportion of its energies to the training of the rising generation of the colored people for the higher duties of life, under an enlightened system of public schools.⁸⁷

But in his message on education⁸⁸ he recommended separate schools:

But the question of local government of public schools is complicated, amongst *us*, by prejudices of race. To conciliate these, at the same time make the system of common schools operative, will require dispassionate deliberation. My judgment is unable to say positively how this difficulty is to be met most effectually; but whether the best means be a mixed Board of Directors for each district, or by a distinct system of districting for each color, I have no doubt the Legislature will bring to the subject that earnest spirit of justice to both races which demands that the schools themselves shall be kept absolutely separate.⁸⁹

He did not, however, indicate any requirement for equal facilities. The University of Oxford was for whites only; he proposed a high school and agricultural college for colored students.⁹⁰ Conversely, he urged the establishment of a

⁸⁷ Senate Journal, 1870, p. 50.

⁸⁸ *Id.*, App., p. 12.

⁸⁹ *Id.*, p. 17.

⁹⁰ *Id.*, pp. 14, 20.

normal school for colored teachers, although there was none for whites:

One Normal School we cannot dispense with, even at the very outset of our educational system. As the white teachers obtainable at present for the common schools are more advanced than those teachers who may be obtained at present amongst the colored people, it appears to me that our first Normal School for the training of teachers should be devoted to the education of teachers of color.⁴¹

A reenactment of the education law in 1873 contained no reference to color.⁴² In 1876 the school laws were amended to recognize distinctions of color,⁴³ and in 1878 segregation was made mandatory:

Be it further enacted, That the schools in each county shall be so arranged as to afford ample free school facilities to all the educable youths in that county, but white and colored pupils shall not be taught in the same school-house, but in separate school-houses.⁴⁴

The Constitution of 1890 provided that

Separate schools shall be maintained for children of the white and colored races. (Article 8, sec. 207.)

CIVIL RIGHTS LEGISLATION

The legislators of 1870 insisted on full equality, without distinction, for Negroes. Section 3 of

⁴¹ *Id.*, p. 13.

⁴² Mississippi Laws, 1873, ch. 1, pp. 1-17.

⁴³ Mississippi Laws, 1876, ch. 113, sec. 8, p. 209.

⁴⁴ Mississippi Laws, 1878, ch. 14, sec. 35, p. 103.

“An Act to repeal certain laws relating to slaves, free negroes and mulattoes and freedmen, and for other purposes”⁴⁵ provided

* * * That it is hereby declared to be the true intent, meaning and purpose of this Act, to remove from the records of the laws of this State all laws of whatever character, which in any manner recognize any natural difference or distinction between citizens or inhabitants of this State, or which in any manner or in any degree, discriminate between citizens or inhabitants of this State, founded on race, color or previous condition of servitude.

Another act prohibited segregation on railroads, steamboats, and stagecoaches.⁴⁶

MISSOURI

Missouri ratified the Fourteenth Amendment in January, 1867. Prior to 1865 the education of Negroes was prohibited. In that year slavery was abolished within the state; the legislature provided separate public schools for Negro children; it also repealed the existing restrictions on Negroes, including those on the competency of Negroes as witnesses in judicial proceedings. However, the prohibition against miscegenation continued, as did the disqualification of Negroes as voters and jurors.

RATIFICATION

The Fourteenth Amendment was presented to the Missouri Legislature on January 4, 1867, in

⁴⁵ Mississippi Laws, 1870, ch. 10, p. 73.

⁴⁶ Mississippi Laws, 1870, ch. 32, p. 104.

the form of a resolution introduced by Senator Bonham. On the same day the Legislature received a message from the Governor, Thomas C. Fletcher. Regarding the first section of the Amendment, the message stated: "⁴⁷

The first section of the proposed amendment secures to every person born or naturalized in the United States, the rights of a citizen thereof in any of the States. It prevents a State from depriving any citizen of the United States of any of the rights conferred on him by the laws of Congress and secures to all persons equality of protection in life, liberty, and property, under the laws of the State.

The Senate voted to ratify the Amendment on January 5, 1867, by a vote of 26 to 6.⁴⁸ The House vote, on January 8, was 85 to 34.⁴⁹ The Joint Resolution ratifying the Amendment recited that "the people of Missouri, in the election of the present General Assembly, have indicated their approval of said amendment," and "the measure is in itself eminently just and proper, and greatly tends to a settlement of the issues growing out of the late rebellion."⁵⁰

SCHOOLS

The Missouri Constitution of 1820 provided that "one school or more shall be established in

⁴⁷ Senate Journal 1867, p. 14.

⁴⁸ *Id.*, pp. 30, 32.

⁴⁹ McPherson, *Reconstruction*, p. 194.

⁵⁰ Mo. Laws 1867, p. 196.

each township as soon as practicable and necessary, where the poor shall be taught gratis." (Art. VI, section 1.) The first school law was enacted in 1825.⁵¹ An "Act respecting slaves, free Negroes and mulattoes" of 1847⁵² prohibited schools for Negroes and declared all meetings of colored persons for purposes of instruction "unlawful assemblages". This law was repealed on February 20, 1865,⁵³ after slavery had been abolished within the state. On the same date an amendment to the school law was approved,⁵⁴ which provided that the school census was to include all colored children (sec. 1) and that

The word "white" wherever it occurs in the act to which this is amendatory, is hereby stricken out; and it is further enacted that the trustees of all school districts in this State shall make provision for the instruction of all children of the proper age in their respective school districts without respect to color, provided that they shall be sent to separate schools. (Sec. 2.)

The Constitution of 1865 authorized the establishment of separate schools for colored children. It provided:

Separate schools may be established for children of African descent. All funds provided for the support of public schools shall be appropriated in proportion to the

⁵¹ Mo. Rev. Laws 1825, p. 711.

⁵² Mo. Laws 1846-47, p. 103.

⁵³ Mo. Laws 1864-65, p. 63.

⁵⁴ *Id.*, p. 125.

number of children, without regard to color.
(Art. IX, § II.)

These provisions were implemented by the school law of 1866,⁵⁵ which made the establishment of schools for colored children mandatory wherever there were more than twenty in a district; where the number of colored children was less than twenty, their proportionate share in the school fund was to be used for their education as the school authorities deemed proper. In all other respects the schools for colored children were to be equal to "others of the same grade." (Sec. 20.)

The requirements for segregated schools were reenacted in 1867 and 1868.⁵⁶

In 1868, the Superintendent of Public Schools made the following statement:

The school law provides for the establishment of separate schools for colored children in every locality wherein the number exceeds fifteen. This is done in deference to the deep prejudice existing in the minds of the loyal and disloyal against the education of the colored and white youth in the same schools. Except this, their schools are to be paid, conducted and superintended the same as other schools. In a few years I am satisfied the prejudice will be so far obliterated that no opposition will be made to the *mixed* schools where the number of

⁵⁵ "An Act to provide for the Reorganization, Supervision and Maintenance of Common Schools," Mo. Laws, 1865-1866, p. 170 (approved March 29, 1866).

⁵⁶ Mo. Laws 1867, p. 160 (approved March 13, 1867); Mo. Laws 1868, D. 165.

colored children is too small for a good separate school."⁵⁷

The 1875 Constitution declared that separate schools for Negro children "shall" be provided (Article XI, sec. 3). This was in contrast to the 1865 Constitution, which used the word "may" (*supra*). In the debate in the 1875 Constitutional Convention this change was not explained. Mr. Switzler, commenting on this language, stated that the section was "substantially" the same as in the Constitution of 1865 and that the committee reporting the section had substituted the word "shall" for "may".⁵⁸ The section was adopted without debate.⁵⁹

In 1889 the school law was amended by a provision making mixed schools illegal.⁶⁰

LEGAL STATUS OF NEGROES

Missouri abolished slavery by ordinance of the State Convention dated January 11, 1865.⁶¹ Soon thereafter numerous laws imposing legal restrictions upon Negroes were repealed,⁶² including the statute which prohibited them from testifying

⁵⁷ Letter to the Superintendent of Public Instruction of Indiana, Report of Superintendent of Indiana for 1867-68, p. 27. Ind. Doc., 1867-68.

⁵⁸ Debates, Missouri Constitutional Convention 1875, vol. IX, p. 30.

⁵⁹ *Id.*, p. 145.

⁶⁰ Mo. Laws 1889, c. CL, sec. 7051a.

⁶¹ Mo. Gen. Stats., 1865, p. 46.

⁶² Mo. Laws, 1864-65, p. 63, an act repealing "all laws recognizing the right of property in man, or intended to protect or perpetuate the institution of slavery in this State".

in court.⁶³ The repeal, however, did not extend to the miscegenation statute.⁶⁴

The Constitution of 1865⁶⁵ declared slavery abolished (Art. I, Sec. II) and provided

That no person can, on account of color, be disqualified as a witness; or be disabled to contract, otherwise than as others are disabled; or be prevented from acquiring, holding and transmitting property; or be liable to any other punishment for any offense than that imposed upon others for a like offense; or be restricted in the exercise of religious worship; or be hindered in acquiring education; or be subjected, in law, to any other restraints or disqualifications, in regard to any personal rights, than such as are laid upon others under like circumstances. (Art. I, Sec. III.)

It restricted the vote to white males (Art. II, Sec. XVIII).

As late as 1872 Negroes were barred from juries.⁶⁶

NEBRASKA

Nebraska ratified the Fourteenth Amendment in June, 1867, four months after its admission to the Union. In the same month the legislature deleted from the territorial school law certain racial provisions. The right of all children to pub-

⁶³ Mo. Rev. Stats., 1855, c. CLXVIII, sec. 6, subs. 9.

⁶⁴ Sec. 3 of the Act regulating marriages (1835), Mo. Rev. Stats. 1840, p. 401.

⁶⁵ Adopted by the Constitutional Convention on April 8, 1865, voted upon by the people on June 6, and declared in force on July 4, 1865. Mo. Gen. Stats., 1865, pp. 19 *et seq.*, 46.

⁶⁶ Mo. Stats., 1872, c. 80, sec. 2.

lie education was declared in 1869. There were no provisions dealing specifically with racial segregation in the public schools. Congress had conditioned Nebraska's entry on its agreement not to deny "the elective franchise or * * * any other right, by reason of race or color". Negroes, however, continued to be excluded from juries until 1873.

RATIFICATION

Governor Butler of the Nebraska Territory, addressing the Territorial Legislature in July, 1866, said of the Fourteenth Amendment that

* * * if fully carried out in letter and spirit, [it] will, as I think, restore harmony and concord to the national counsels, and reaffirm in our Constitution the fundamental principles enunciated in the Declaration of Independence, that all men are created free and equal.⁶⁷

On May 17, 1867, speaking as Governor of the new state, he said:

This proposed amendment * * * embodies in a few short, but comprehensive sentences the essence of the lesson taught the American people during the terrible agony of civil war. In extending the right of citizenship to "all persons born or naturalized in the United States, and subject to the jurisdiction thereof," and prohibiting the denial of the equal protection of the laws to any such person, it accepts fully, and forever vindicates by the solemn pledge of a nation the idea that was the cornerstone of American Independence, but has been

⁶⁷ House J., 1st Sess., 1866, p. 15.

for a time rejected by the builders of the national superstructure.⁶⁶

The House on June 8, 1867 voted in favor of ratification, 26 to 11,⁶⁷ and the Senate followed on June 15, by a vote of 8 to 5,⁶⁸ having rejected two proposed changes, one a virtual paraphrase of Section 2 of the Amendment, the other a proposal for a referendum on the Amendment.⁶⁹

SCHOOLS

The laws of the Territory of Nebraska provided for free schools for whites only, and exempted Negroes from taxation for educational purposes.⁷⁰ The territorial laws were carried over by the new State Constitution.⁷¹ The school law, when revised in 1867, did not mention either of the foregoing provisions of the territorial law.⁷² In 1869, the school laws were again revised. While the territorial law had reserved the territorial school fund

for the purpose of affording the advantages of a free education to all the white youth of this territory * * *

⁶⁶ House J., 3d Sess., 1867, pp. 74-75.

⁶⁷ *Id.*, p. 149.

⁶⁸ Sen. J., 3d Sess., 1867, p. 174.

⁶⁹ *Id.*, p. 163.

⁷⁰ Nebr. Rev. Stats., 1866, c. 48, § 48.

⁷¹ Const. 1866, Art. XI, § 1.

⁷² See Nebr. Laws, 1867, Act of June 24, 1867, p. 101ff. Gov. Butler, in his address to the first session of the State Legislature devoted to regular business, said: "Your most earnest attention is * * * invoked, that no pains may be spared to render Nebraska second to no other State in the facilities offered to all her children, irrespective of sex or condition. * * *" House J., 3d Sess., 1867, p. 69.

the 1869 law, in referring to the same fund, read as follows:

for the purpose of affording the advantages of free education to all the youth of this State * * *.⁷⁵

The Constitution of 1875 directed the legislature to

provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years.⁷⁶

LEGAL STATUS OF NEGROES

Under the territorial laws of Nebraska Negroes were barred from voting⁷⁷ and jury service;⁷⁸ miscegenation was also prohibited.⁷⁹

The Constitution of 1866 again restricted the vote to white males.⁸⁰ When Congress voted to admit Nebraska in February, 1867, it did so with the condition that

within the State of Nebraska there shall be no denial of the elective franchise, or of any other right, to any person, by reason of race or color, excepting Indians not taxed; and upon the further fundamental condition that the legislature of said State, by a solemn public act, shall declare the

⁷⁵ Nebr. Laws, 1869, Act of Feb. 15, 1869, § 71, p. 128.

⁷⁶ Art. 8, sec. 6.

⁷⁷ Nebr., Rev. Stats., 1866, c. 17, § 33.

⁷⁸ *Id.*, Code of Civil Procedure, Tit. 19, § 657.

⁷⁹ *Id.*, c. 34, § 3.

⁸⁰ Const., 1866, Art. II, § 2.

assent of said State to the said * * * condition.⁸²

The Nebraska legislature accepted this provision.⁸³

The law excluding Negroes from juries was declared void in *Brittle v. People*, 2 Neb. 198 (1873) by reason of the Congressional proviso. The court did not consider or mention the possible effect of the Fourteenth Amendment.

NEVADA

Nevada ratified the Fourteenth Amendment in January, 1867, by overwhelming votes in both houses of the legislature, apparently after little, if any, debate. Negroes had been excluded from the public schools from the time of their institution in 1865, and because there was a small number of colored children who were scattered throughout the state, almost no effort was made toward the establishment of separate school facilities for them. The state Supreme Court in 1872 held that exclusion where no alternate schools were furnished violated the state constitution. *State ex rel. Stoutmeyer v. Duffy*, 7 Nev. 342. In 1867, the Negro was unable to vote or act as a juror; restrictions upon him as a witness had been lifted in 1865, but continued with respect to Indians and Chinese.

RATIFICATION

The Governor addressed the Legislature on January 10, 1867, saying in part:

⁸² 14 Stat. 391.

⁸³ Sen. J., 2d Sess., 1867, p. 35; House J. 2d Sess., 1867, p. 52.

It is your high privilege and sacred obligation to ratify the [Fourteenth] amendment. * * * The just equalization of political power by a change in the basis of representation, the protection of life, liberty and property extended to the weak, heretofore enslaved and brutalized; [exclusion from office of Confederate leaders, the established validity of the federal debt, and invalidity of the Confederate] are the only conditions imposed. * * *⁸⁴

Three resolutions were submitted, two in the Senate, one in the House. The Standing Committee of the Senate on Federal Relations reported on January 21 all three as substantially the same, and stated that "Inasmuch as the discussion of the merits and demerits of these Amendments are the current history of the day, the Committee deem it time thrown away to enter into such discussion, and ask their immediate passage."⁸⁵ This followed the next day by a vote of 11-3.⁸⁶

The House had already acted. Receiving a favorable report on January 11,⁸⁷ it voted the same day to ratify, 34-4.⁸⁸

SCHOOLS

Nevada's first constitution, adopted in 1864 when the state was admitted, provided for a system of public schools.⁸⁹ This was implemented by

⁸⁴ Sen. J., 1867, App., p. 9.

⁸⁵ Sen. J., 1867, p. 42.

⁸⁶ *Id.*, at p. 47.

⁸⁷ House J., 1867, p. 21.

⁸⁸ *Id.*, at p. 25.

⁸⁹ Nev. Const., 1864, Art. XI, sec. 2.

"An Act to provide for the maintenance and supervision of Public Schools," passed in 1865, which contained the following provision:

Negroes, Mongolians, and Indians shall not be admitted into the public schools; [public funds may be withheld where they are so admitted] *provided*, that the Board of Trustees of any district * * * may establish a separate school for the education of negroes, Mongolians, and Indians, and use the public school funds for the support of the same.⁹⁰

This provision was substantially reaffirmed in 1867, after the Legislature had ratified the Fourteenth Amendment.⁹¹

The Superintendent of Public Instruction reporting for the school year ending August 31, 1866, announced that "A public school for colored children, the first and only one in the State, was organized and maintained for nearly six months. It had an average attendance of twenty-nine pupils."⁹² This school was located in Storey County; apparently some Indian or Mongolian children were admitted since there were only 21 Negro children in the state.⁹³ Some of the state's Negro children must have been unable to attend this school, since only 14 lived in Storey County.⁹⁴

The Superintendent's next report stated:

⁹⁰ Nev. Stats., 1865, c. 145, sec. 50.

⁹¹ Nev. Stats., 1867, c. 52, sec. 21 (March 8). By this statute the sanction of withdrawing funds seems to have been removed.

⁹² Superintendent's Report, p. 14, Sen. J., 1867, App.

⁹³ *Id.*, Table III.

⁹⁴ *Ibid.*

Inasmuch as neither Mongolian nor Indian children, except a few living in white families, manifest any desire to attend the public schools, this interdict affects mainly the Negro race.⁹⁵

* * * * *

Few of the colored race are able to afford private tuition, and as a consequence we have growing up among us juvenile Pariahs, condemned by our State to ignorance and its attendant vices. * * * We believe this inhibition unwise, unjust, and unconstitutional.

Unwise, because dark, tawny or copper-colored children are no more calculated to make intelligent and virtuous citizens without education, than are white children: unjust, because the colored citizen is denied advantages secured in part by taxation levied upon his own industry: unconstitutional, because in violation of the express provisions of Section 1, and in contravention of the plain intendment of section 3 of Article XI of our State constitution.

* * * * *

If the prevalent prejudices against admixture of the races will not allow the abolition of the penalty for the crime of color, it is respectfully submitted whether it is not the duty of the Legislature to devise some "suitable means" of securing to these unfortunates the advantages of "intellectual * * * and moral improvement."⁹⁶

⁹⁵ Education was not compulsory even for whites. A large part of each Report is given over to a discussion of the merits of compulsory attendance.

⁹⁶ Superintendent's Report, pp. 16-17, Nov. 1868, Nev., Sen. J., 1869, App.

In his next report for 1869 and 1870, the Superintendent stated:

From the returns of Census Marshals it appears that there are thirty negro children of school age in the State.

For these no educational provision is made. They are denied admission to the Public Schools; separate schools are permitted under the law, but as they are not commanded, colored children are without educational privileges. Believing that it is not the intention of our State Government to be guilty of the injustice of taxing colored citizens for the support of Public Schools, and at the same time denying them the benefit of these schools, I beg to call attention to the fact, that our statutes are at present chargeable with this unworthy discrimination.⁹⁷

In 1872, the case of *State ex rel. Stoutmeyer v. Duffy*, 7 Nev. 342, was decided by the state Supreme Court. Relator, a Negro, otherwise qualified, applied for mandamus against the school trustees who had refused him admission to a public school, contending that Section 50 of the 1865 school law⁹⁸ violated the state constitution, the Fourteenth Amendment, and the federal Civil Rights Bill. The federal contentions were rejected, the court stating:

While it may be, and probably is, opposed to the spirit of the [constitution and laws of the United States], still it is not obnoxious to their letter; and as no judicial action is more dangerous than that most

⁹⁷ Superintendent's Report, p. 14, Dec. 1, 1870, Nev. Sen. J., 1871, App.

⁹⁸ See p. 298, fn. 90, *supra*.

tempting and seductive practice of reading between the written lines, and interpolating a spirit and intent other than that to be reached by ordinary and received rules of construction or interpretation, such course will be declined. * * * (p. 346).

The court declared, however, that Section 50 of the school law contravened the provision of the state constitution that "the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public school." If, said the court, the legislature acted to secure the attendance of some, it was required to secure the attendance of all (p. 347). Accordingly, mandamus was granted.

The Chief Justice, in concurring, relied on the state constitutional provision that "in all cases * * * where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." He agreed, however, that separate schools were constitutional (p. 355).

The dissenting judge was also of the opinion that the Fourteenth Amendment was not relevant to the question. He stated:

The statute [section 50] does not abridge any privilege or immunity of the applicant, as a citizen of the United States. The privilege of admission to the common schools of this state is no more inherent in or connected with the *status* of citizenship than is the elective franchise; and to secure that against unfriendly state legislation, an additional amendment was required and was proposed. This privilege is not embraced within any meaning which has ever been attributed to the words "life, liberty

or property," and the equal protection of the laws cannot well be denied to a right which never existed. (Pp. 355-356.)

No action was ever taken by the Nevada legislature to require the establishment of separate schools. In his next report in 1873 the Superintendent stated:

In explanation of the omission [of statistics for colored children], I am happy to say that, practically, the children of all citizens are now free to attend our public schools.

The statute yet discriminates against the children of colored citizens, but by decision * * * the section excluding negroes was declared unconstitutional.

* * * * *

I believe that this ruling has been cheerfully complied with throughout the State, and that the privilege which it secures is eagerly enjoyed by the hitherto proscribed race.⁹⁹

In 1873, Section 50 of the school law was dropped.¹

LEGAL STATUS OF NEGROES

The franchise was limited to white males by the Constitution of 1864, Article II, sec. 1. By statute, jurors were required to be qualified electors.² Article XVIII of the Constitution, adopted in 1880, removed the word "white" from Article II.

While Nevada was a territory, its law provided that

⁹⁹ Superintendent's Report, pp. 15-16, Dec. 1, 1872, Nev. Sen. J., 1873, App.

¹ Nev. Stats., 1873, c. 81, sec. 14.

² Nev. Stats., 1865, c. 33, sec. 18.

No black, or mulatto person, or Indian, or Chinese, shall be permitted to give evidence in favor of, or against, any white person.³

But the first session of the state legislature changed this to read:

No Indian or Chinese shall be permitted to give evidence in favor or against any white person, * * * In no case shall the Act of which this is amendatory, be construed to exclude as witnesses any negro, black or mulatto person, but the credibility of such negro, black or mulatto person shall be left entirely with the jury.⁴

Marriage of whites with Negroes, Indians or Chinese was a criminal offense.⁵

NEW HAMPSHIRE

The Fourteenth Amendment was adopted by New Hampshire in July, 1866, against contentions that the Amendment infringed upon states' rights by controlling legislation on "purely local" matters. Neither the school laws of the state, nor any other legislation, appear to have discriminated in any way against the Negro.

RATIFICATION

The Governor submitted the Fourteenth Amendment to the Legislature on June 21, 1866,⁶ with a brief recommendation for ratification. It was referred to a committee of ten, which reported on June 26, 1866.⁷ A majority recom-

³ Nev. Terr. Laws, 1861, c. 28, sec. 13.

⁴ Nev. Stats., 1865, c. 136, sec. 1.

⁵ Nev. Terr. Laws, 1861, c. 32.

⁶ House J., 1866, p. 137.

⁷ Sen. J., 1866, pp. 70 *et seq.*; House J., 1866, pp. 174 *et seq.*

mended ratification, without detailed discussion of the various sections of the Amendment. A minority of three filed objections,⁸ which may be summarized as follows: (1) The Southern states were excluded from all participation in the Congressional debates; (2) the Amendment was a dangerous infringement of states' rights, "assuming, as it does, to control their legislation in matters purely local in their character, and impose disabilities on them for regulating, in their own way, the right of suffrage—clearly a state right * * *"; (3) the effect of the second section would be to remove time-honored restrictions upon the right to vote and to open the ballot box to a large class of persons incapable of exercising their suffrage intelligently; (4) the real design of the Amendment was to force, by indirect means, Negro suffrage upon "an unwilling people".

The House voted for ratification on June 28, 1866.⁹ The Senate, following some debate on July 5,¹⁰ voted for ratification on July 6.¹¹

SCHOOLS

New Hampshire's system of free public schools dates from the time when New Hampshire was a part of the Massachusetts Bay Colony. The Constitution of 1783 made it the duty of towns to educate their youth. In 1805 there was organized a system of public schools.¹² Neither this

⁸ House J., 1866, pp. 176 *et seq.*

⁹ House J., 1866, p. 231.

¹⁰ Unreported. See Sen. J., 1866, pp. 85, 88.

¹¹ *Id.*, p. 94.

¹² N. H. Laws, Dec. 1805, p. 45.

law nor any of the later school laws contained any reference to racial distinctions.¹³ No legislation has been found which discriminated against Negroes.

NEW JERSEY

New Jersey ratified the Fourteenth Amendment in September, 1866, apparently without any debate. In March, 1868, the Legislature purported to rescind the ratification. One of the reasons given was that the Amendment interfered with the legislative power of the states and enlarged the powers of the federal courts. The school laws in force in 1866 and 1868 did not contain racial distinctions. They were interpreted, however, to permit separate schools, although requiring education for all children. A law in 1881 prohibited exclusion of colored children from any public school in their district. This statute was construed in *Pierce v. Trustees*, 46 N. J. L. 76, aff'd., 47 N. J. L. 348 (1884), to entitle Negro children to attend the public school closest to their residence in a district containing separate schools for Negroes and whites, but no constitutional issue was involved. Suffrage prior to the adoption of the Fifteenth Amendment was limited to white males.

RATIFICATION

New Jersey acted on ratification of the Fourteenth Amendment in September, 1866. The Governor in a brief message recommended ratification.¹⁴

¹³ See N. H. Gen. Stats., 1867, Tit. 11; Gen. Laws, 1878, Tit. 11.

¹⁴ Minutes of the Assembly, Extra Session, 1866, p. 8.

The Assembly voted favorably on September 11,¹⁵ and the Senate concurred on the same day.¹⁶ No debates are reported.

After the Democratic Party had gained control of the Legislature as a result of the elections in 1867, it rescinded the ratification. The Committee on Federal Relations, on January 28, 1868, submitted a joint resolution¹⁷ which repudiated the Amendment. Some of the reasons given were as follows: (1) the exclusion of the representatives of ten States from the Congress which adopted the Amendment; (2) the ouster of Senator Stockton of New Jersey from the United States Senate for the purpose of securing the necessary two-thirds vote; (3) the subsequent reconstruction measures in ten Southern States, which were arbitrary and unconstitutional; (4) the *ex post facto* character of its punitive provisions; (5) the vague provisions of the Amendment which would help the federal judiciary and Congress to encroach upon states' rights; (6) the new apportionment provisions intended solely to secure Negro suffrage.

The resolution was adopted by each House on February 19, 1868,¹⁸ and February 20,¹⁹ respectively, and passed over Governor Ward's veto in March.²⁰ It was submitted to Congress by a mem-

¹⁵ *Id.*, p. 17.

¹⁶ Sen. J., Extra Session, 1866, p. 14.

¹⁷ Sen. J., 1868, pp. 39-40; N. J. Laws 1868, p. 1225.

¹⁸ Sen. J., 1868, pp. 197-198.

¹⁹ Minutes of the Assembly, 1868, p. 309.

²⁰ Sen. J., 1868, p. 356; Minutes of the Assembly 1868, p. 743. In the Assembly a protest by Mr. Atwater and other members was read but not entered on the minutes (*ibid.*).

ber from New Jersey on March 30, but returned to him, before the reading had been completed, for the reasons that it was "disrespectful to the House, and scandalous in character."²¹

SCHOOLS

New Jersey made some provision for Negro education at an early date. The 1821 Act in respect of slaves required slave owners to cause every one of their slaves under 21 years to be taught to read, and imposed a fine for non-compliance.²²

The Constitution of 1844²³ provided for a fund for the support of "free schools," the income therefrom to be annually appropriated to the support of "public schools, for the equal benefit of all the people of the state" (Article IV, section VII, subs. 6).

In 1846, the year in which slavery was abolished in the state,²⁴ a system of public schools was established.²⁵ Nineteen years later the Superintendent of Public Schools characterized it as "yet crude and imperfect".²⁶ The 1846 legislation did not mention Negroes. The Superintendent of Public Schools in 1864, in a pamphlet entitled "Interpretation of the School Law,"²⁷ which was

²¹ Congressional Globe, 40th Congress, 2d Sess., p. 2226.

²² N. J. Rev. Law, 1821, p. 272.

²³ See N. J. Laws, 1845, pp. 5 *et seq.*

²⁴ Laws of New Jersey, 1847, tit. XI, c. 6.

²⁵ *Id.*, tit. XII, c. 3. See also the statute concerning the school fund, *id.*, c. 1.

²⁶ Report of Superintendent of Public Schools for 1864, p. 1, N. J. Documents, 1865.

²⁷ *Id.*, Appendix, p. 15.

distributed to school officers, dealt with the question of schools for colored children, as follows:

1. There is no section of the law nor any decision of the courts that deprives colored children of the advantages of public school instruction.

2. Schools may be established for the special benefit of colored children.

* * * * *

Trustees have full authority to establish schools and employ teachers for their respective districts; and if in their judgment the interests of a district require the establishment of a school for colored children, or the establishment of two or more schools differing as to grade, or character, they may act accordingly, provided always that every child enjoys the advantages to which he is entitled.²⁸

In 1867, the State Superintendent declared in his report:

* * * there is one cause which is the foundation of all reform, the corner stone of our government, the charter of our liberties, the secret of our prosperity in the past and the hope of our stability and success in the future, and that is a common school education for the whole people in the whole land without regard to race, color, condition or sex.²⁹

From the 1869 report of the Superintendent for Hudson County it appears that 32 buildings in the county were occupied by schools for white children, two by schools for colored children.³⁰

²⁸ *Id.*, Appendix, pp. 69-70.

²⁹ N. J. Doc., 1867, p. 671.

³⁰ N. J. Doc., 1869, p. 774.

The State Constitution, adopted in 1875, left the school provisions of the Constitution of 1844³¹ virtually intact, adding the sentence:

The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years.

None of the school legislation prior to 1881 contains any reference to race.³² In 1881 an act was passed expressly providing:

That no child, between the age of five and eighteen years of age, shall be excluded from any public school in this state on account of his or her religion, nationality or color.³³

This law was held to entitle Negro children to attend the public school closest to their residence, in a district where there were three schools for white children and one for Negroes. *Pierce v. Union District School Trustees*, 46 N. J. L. 76, aff'd, 47 N. J. L. 348 (1884). The decision was based solely upon the language of the statute. It did not discuss any constitutional aspects.

³¹ N. J. Rev. Stat., 1877, pp. XXXIII *et seq.*, Art. IV, Section VII, (6).

³² See the "Act to establish a system of Public Instruction," Laws, 1867, p. 360; "An Act to make free the Public Schools of the State," Laws, 1871, p. 94; "Act relative to the attendance of Children at School" (making school attendance compulsory), Laws, 1874, p. 135.

³³ Laws, 1881, p. 186. Re-enacted in 1903, with a slight change as to age. (L., 1903, 2d Sp. Sess., c. 1 § 125, p. 48.)

LEGAL STATUS OF NEGROES

Suffrage in New Jersey was limited to whites by the Constitution of 1844.²⁴ Jury service was not restricted to qualified voters, as in most states, but to "citizens" "resident within the county".²⁵ The Civil Rights Act, passed in 1884, expressly prohibited the exclusion of Negroes from juries. It also provided for "full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances * * *, theatres and other places of public amusement."²⁶

NEW YORK

New York ratified the Fourteenth Amendment in 1867. Separate schools, permitted since 1841 and required to be equal after 1864, continued until 1900. They were upheld by the New York courts against attacks based on the Civil Rights Act of 1866, the Fourteenth Amendment, and a state statute of 1873 prohibiting denial of "full and equal enjoyment" of the common schools. *Dallas v. Fosdick*, 40 Howard's Pr. R. 249 (1869); *People v. Easton*, 13 Abbott's Pr. R. (N. S.) 159 (1872); *People v. Gallagher*, 93 N. Y. 438 (1883). In 1900 the Legislature outlawed segregated schools. New York had permitted Negroes to serve on juries, and to vote—under certain restrictions—before the Civil War.

²⁴ N. J., Const., 1844, Art. II, sec. 1.

²⁵ Laws of N. J., 1847, p. 966.

²⁶ Laws, 1884, p. 339.

RATIFICATION

Governor Fenton's recommendation of January 2, 1867, for ratification of the Fourteenth Amendment did not go into detail:³⁷

It will be your high privilege, in the name of the people of this State, to ratify the proposed constitutional amendment, which I have the honor to transmit upon this opening day of your session. I cannot too earnestly recommend your prompt action, in order that the judgment of New York on a proposition so moderate and so just, may be submitted at the earliest day to the unreconstructed States, and that, on our part, there may be no delay in anchoring these fraternal guarantees in the Federal Constitution. I need not discuss the features of this amendment; they have undergone the ordeal of public consideration since the adjournment of Congress in July last, and they are understood, appreciated and approved. * * *

There is no other plan before the people, and the verdict of the ballot-box implies that no other plan is desired. * * *

The Senate ratified on January 3, by a vote of 23 to 3,³⁸ and the Assembly on January 10, by a vote of 71 to 36.³⁹

SCHOOLS

Under the laws of New York of 1841⁴⁰ and 1847⁴¹ the establishment of separate schools for

³⁷ Annual Message, Jan. 2, 1867. Assembly Journal, 1867, Vol. 1, pp. 13-14.

³⁸ Senate Journal, 1867, p. 34.

³⁹ Assembly Journal, 1867, p. 77.

⁴⁰ N. Y. Laws, 1841, c. 260, sec. 15, p. 238.

⁴¹ N. Y. Laws, 1847, c. 480, sec. 147, p. 714. (Repealed, Laws, 1864, c. 533, Tit. 10, sec. 4, p. 1281.)

colored children was authorized. This was continued by the Common School Act of 1864,⁴² which, however, required that the facilities for instruction be equal to those of the white schools.⁴³

There was no discussion of school segregation in the Constitutional Convention of 1867-68.

Special acts authorized specific cities and towns to establish separate schools for colored children.⁴⁴ In some cases the authorization was in terms of a requirement for separate schools.⁴⁵

In *Dallas v. Fosdick*, 40 How. Pr. Rep., 249 (Sup. Ct., February, 1869), the validity of a provision in the city charter of Buffalo requiring separate schools was sustained. The court did not refer to the Fourteenth Amendment, holding, in effect, that public education was a privilege furnished at the pleasure of the state:

The right to be educated in the common schools of the state, is one derived entirely from the legislation of the state; and as such, it has at all times been subject to such restrictions and qualifications as the legislature have from time to time deemed it proper to impose upon its enjoyment (p. 251).

⁴² N. Y. Laws, 1864, ch. 555, pp. 1211-1290.

⁴³ *Id.*, p. 1281.

⁴⁴ N. Y. Laws, 1832, c. 136, § 1, p. 211; Laws, 1845, c. 306, p. 327; Laws, 1847, c. 51, § 30, p. 61; Laws, 1850, c. 60, § 10, p. 70; c. 143, § 4, p. 238; c. 349, § 22, p. 757; Laws, 1863, c. 446, § 12, p. 762.

⁴⁵ N. Y. Laws, 1851, c. 171, § 15, p. 327; Laws, 1852, c. 291, p. 430 (Repealed, Laws, 1859, c. 187, p. 447); Laws, 1853, c. 230, Tit. VI, § 5, 7, p. 487.

The court held that the Civil Rights Act of 1866 did not secure to Negroes the "right or privilege" of attending a white school.

In *People ex rel. Dietz v. Easton*, 13 Abbott's Pr. Rep. (N. S.) 159 (Sup. Ct., November, 1872), a regulation of the Albany board of public instruction, which required colored children to attend separate schools, was sustained against the contention that it violated the "privileges and immunities" clause of the Fourteenth Amendment. On this point the court cited *State ex rel. Garne v. McCann*, 21 Ohio 198.

In April, 1873, the legislature passed an Act "to provide for the protection of citizens in their civil and political rights". This repealed all laws discriminating "against any citizen on account of color, by the use of the word 'white,' or any other term in any law, statute, ordinance or regulation".⁴⁶ The law further provided:

No citizen of this State shall, by reason of race, color or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility or privilege furnished by [innkeepers, common carriers, theaters or places of amusement, or] by trustees, commissioners, superintendents, teachers and other officers of common schools and public institutions of learning * * * (Sec. 1).

This provision, however, did not end segregation.

Ten years later the Court of Appeals considered the question of segregated schools in *People ex*

⁴⁶ N. Y. Laws, 1873, c. 186, sec. 3.

rel. King v. Gallagher, 93 N. Y. 438 (1883). The majority held compulsory segregation valid under the Fourteenth Amendment. Referring to the *Slaughter-House Cases*, 16 Wall. 36, the opinion stated:

It would seem to be a plain deduction from the rule in that case that the privilege of receiving an education at the expense of the State, being created and conferred solely by the laws of the State, and always subject to its discretionary regulation might be granted or refused to any individual or class at the pleasure of the State (p. 447).

With reference to the "equal protection" clause of the Fourteenth Amendment, the court held that what was required was "equality and not identity" of privileges and rights, and such equality existed in the separate schools (p. 455). For the same reason the court found the 1873 statute inapplicable (p. 456).

The dissenting opinion stated that

* * * the object of the amendment was not only to give citizenship to colored persons, but by preventing legislation against them distinctly as colored, or on the ground of color, secure exemption against any discrimination which either implies legal inferiority in civil society or lessens the security of their rights, and which, if permitted, would, in the end, subject them while citizens to the degrading condition of an enslaved race * * * (p. 458).

A later case, *People ex rel. Cisco v. School Board*, 161 N. Y. 598 (1900) followed the *Gallagher* case.

Authority to maintain separate schools was continued⁴⁷ until 1900. In that year the Legislature enacted an "Act to secure equal rights to colored children in the state of New York" which provided that

No person shall be refused admission into or be excluded from any public school in the state of New York on account of race or color.⁴⁸

LEGAL STATUS OF NEGROES

New York was one of the few states which had permitted Negroes to vote before the Civil War. Article II, Section 1 of the 1846 Constitution had extended the franchise to Negroes although with residence and property qualifications not required of white persons.⁴⁹

The Legislature which had voted on April 14, 1869, to ratify the Fifteenth Amendment, rescinded its ratification on January 5, 1870.⁵⁰ In 1874 the restrictions imposed on colored voters were removed by constitutional amendment.

Negroes were not excluded from juries by law.⁵¹

⁴⁷ N. Y. Laws, 1894, c. 556, tit. XV, art. 11, §§ 28, 29, p. 1288. (Sec. 28 repealed by N. Y. Laws, 1900, c. 492, § 2, p. 1173; sec. 29 repealed by N. Y. Laws, 1938, c. 134, p. 657.)

⁴⁸ N. Y. Laws, 1900, c. 492.

⁴⁹ In November 1869, the people rejected a new constitution, but approved its retention of the property qualification for colored voters. See 5 Thorpe, *American Charters, Constitutions and Organic Laws*, p. 2693.

⁵⁰ N. Y. Laws, 1870, p. 2147.

⁵¹ N. Y. Rev. Stat. at L., 1869, Part III, c. 7, tit. 4, art. 2, § 13.

NORTH CAROLINA

North Carolina, after rejecting the Fourteenth Amendment in December, 1866, ratified it in July, 1868. The Constitution of 1868 took no position on segregation, although the Convention itself had resolved in favor of separate schools. In April, 1869, a school law was adopted establishing separate schools.

RATIFICATION

In ratifying the Thirteenth Amendment, the legislature in its resolution of ratification specified "That it does not enlarge the powers of the Congress to legislate on the subject of freedmen within the States."⁵² Fears had been expressed that under the second section of that Amendment Congress would claim and use the power

* * * to say who shall testify in our courts, or sit in the jury box, or on our judicial benches—who shall be invested with the elective franchise—or whether the negro may be permitted to intermarry with the white race * * *. The advocates of negro equality will, under this amendment, contend that he is not free, so long as there is a distinction or discrimination between him and the white man; they will insist that there shall be but one law common to both races. * * * A revolution is demanded of us, in all our social relations. * * *

Six months later the Fourteenth Amendment was submitted for ratification. In his message

⁵² House Journal, 1865-66, p. 135.

⁵³ Senate Journal, 1865-66, pp. 149-155.

to the Legislature, Governor Worth recommended its rejection, saying in part

If there be any feature in the American system of freedom which gives to it practical value, it is the fact that a municipal code is provided under the jurisdiction of each State, by which all controversies as to life, liberty or property, except in the now limited field of Federal jurisdiction, are determined by a jury of the county or neighborhood where the parties reside and the contest arises; but if Congress is hereafter to become the protector of life, liberty and property in the States, and the guarantor of equal protection of the laws, and, by appropriate legislation, to declare a system of rights and remedies, which can be administered only in the Federal Courts, then the most common and familiar offices of justice must be transferred to the few points in the State where these courts are held, and judges and other officers, deriving and holding their commissions, not from the authority and people of the State as heretofore, but from the President and Senate of the United States. The States, as by so much, are to cease to be self-governing communities as heretofore * * *.⁵⁴

The Legislature referred the matter to a Joint Select Committee on the Constitutional Amendment, which recommended against ratification. Its report⁵⁵ referred to the following objections:

In the first section it is provided that "no State shall make or enforce any law

⁵⁴ House Journal, 1866-67, p. 29.

⁵⁵ Senate Journal, 1866-67, pp. 91-105.

which shall abridge the *privileges or immunities* of citizens of the United States." What those privileges and immunities are, is not defined. Whether reference is had only to such privileges and immunities as may be supposed now to exist, or to all others which the Federal Government may hereafter declare to belong to it, or may choose to grant to citizens, is left in doubt, though the latter construction seems the more natural, and is one which that Government could at any time insist upon as correct and entirely consistent with the language used. With this construction placed upon it, what limit would remain to the power of that Government to interfere in the internal affairs of the States? And what becomes of the right of a State to regulate its domestic concerns in its own way? Whatever restrictions any State might think proper, for the general good, to impose upon any or all its citizens, upon a declaration by the Federal Government that such restrictions were an abridgement of the privileges or immunities of the citizens of the Union, such State laws would at once be annulled. For instance: the laws of North Carolina forbid the intermarriage of white persons and negroes. But if this Amendment be ratified, the Government of the United States could declare that this law abridged the privileges of citizens, and must not be enforced; and miscegenation would thereupon be legalized in this Commonwealth. Grant that such action on the part of the Government would not be probable, still it would be possible; and its bare possibility sufficiently exemplifies the boundlessness of

the powers which the Amendment would confer on the Federal Government.

* * * * *

In the final section, power is given to Congress "to enforce by appropriate legislation, all the provisions of this Article." How wide a door is hereby opened for the interference of Congress, with subjects hitherto regarded beyond its range, it is impossible adequately to conceive, until experience shall have tested the matter. * * *

The proposal to reject the amendment was approved by both Houses.⁵⁶

On July 2, 1868, the Reconstruction Legislature ratified the Amendment without discussion, the Governor merely recommending "immediate ratification" as the "first business to be performed by the Legislature".⁵⁷ The two Houses approved on the same day.⁵⁸

SCHOOLS

Although the North Carolina Constitution of 1776 incorporated provisions for education, the first public school law was not enacted until 1839. From that time until the Civil War the public school system developed rapidly.⁵⁹ School districts were to be established "having regard to the number of white children in each."⁶⁰ No pro-

⁵⁶ House Journal, 1866-67, p. 183; Senate Journal, 1866-67, p. 138.

⁵⁷ Senate Journal, 1868, p. 12.

⁵⁸ *Id.*, p. 15; House Journal, 1868, p. 15.

⁵⁹ Knight, *Public Education in the South* (1922), pp. 145-55, 233-8.

⁶⁰ Laws of North Carolina, 1838-39; ch. VIII, sec. 3, p. 13.

vision was made for education of even free persons of color, and it was forbidden to teach slaves to read or write or to give or sell them books or pamphlets.⁶¹

Immediately after the war, schools for the freedmen were established by charitable organizations, but the common schools were not opened to Negroes. The Act of 1866 prescribing the rights of "persons of color" did not put them on an equality with whites.⁶²

The Constitution of 1868 provided that

ARTICLE I. Section 27. The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.

ARTICLE IX. Section 2. The general assembly, at its first session under this constitution, shall provide, by taxation and otherwise, for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years.

It contained no provision either requiring or prohibiting separate schools. The Constitutional Convention did, however, adopt the following resolution:

Resolved, That it is the sense of this Convention that intermarriages and illegal intercourse between the races should be discountenanced, and the interests and happiness of the two races would be best pro-

⁶¹ Laws of North Carolina, 1830-31, ch. VI, p. 11; see also North Carolina Revised Statutes 1837, ch. 111.

⁶² Laws of North Carolina, Spec. Sess., 1866, ch. 40, p. 99.

moted by the establishment of separate schools.⁴³

On the other hand, it refused to insert a proposed proviso in the article on Corporations other than Municipal:

Mr. Durham moved to amend by adding, "Provided, That institutions of learning in which black and white people are educated promiscuously, shall not be incorporated under general laws, or by special act."

Mr. Hood moved to amend the amendment of Mr. Durham, which, after some discussion, was withdrawn.

The question recurred on the amendment of Mr. Durham.

Mr. Durham demanded the yeas and nays.

The demand was not sustained.

The amendment was lost.⁴⁴

In the Address (of the convention) to the People of North Carolina, explanatory of the Constitution, is the following:

Some persons have been so bold or ignorant, as to allege, that white and colored people are required to be enrolled in the same militia company, and white and colored children to attend the same schools, and that intermarriages between the races are encouraged. All these assertions are false, as any reader of the Constitution will see. *All these matters are left now, as they were by the Constitution of 1776, by the Constitution of 1835 and by the proposed Constitution of 1865, to be regulated by the representatives of the people in the General Assembly.* Any one who denies the pro-

⁴³ Convention Journal, p. 473.

⁴⁴ *Id.*, p. 287.

priety of thus leaving them, both impeaches the wisdom of our ancestors and distrusts the people of the future.⁶⁵

In his inaugural address to the Legislature on July 4, 1868, two days after its ratification of the Fourteenth Amendment, Governor Holden pointed out that the new Constitution "provides for education as '*a right*,' which it is '*the duty* of the State to guard and maintain.'" ⁶⁶ He went on to recommend separate schools:

The injunction of the Constitution regarding education should be faithfully observed * * *. The first duty of a free State is to educate its children. It cannot be too often repeated that the structure and perpetuity of free institutions depend on the intelligence and virtue of the people. We must either prepare to educate thoroughly the rising generation of both races, or abandon the hope that we shall continue a free, self-governing State. It does not follow, nor does the [State] Constitution require, that the white and colored races shall be educated together in the same schools. It is believed to be better for both, and more satisfactory to both, that the schools should be distinct and separate. But they should be equally calculated to impart instruction, and the schools for the two, thus separate and apart, should enjoy equally the fostering care of the State.⁶⁷

He also recommended separate companies and regiments for white and colored in the militia.⁶⁸

⁶⁵ *Id.*, p. 485.

⁶⁶ North Carolina Public Documents, 1867-68, Doc. No. 2, Ses. 1868, p. 2.

⁶⁷ *Id.*, pp. 5-6.

⁶⁸ *Id.*, pp. 7-8.

Later that year, in his message to the regular session of the Legislature, the Governor again recommended that the schools be separate, "but in other respects there should be no difference in the character of the schools, or in the provision made to support them."⁶⁹

The "Act to Provide for a System of Public Instruction" of April 12, 1869, provided that the local school authorities establish "a separate school or separate schools for the instruction of children and youth of each race * * *."⁷⁰ The Constitution was amended in 1875 to require separate schools.⁷¹

OHIO

Ohio ratified the Fourteenth Amendment in January, 1867, and rescinded its ratification in 1868, declaring that the Amendment combined several distinct propositions which had already been fully provided for in the Federal Constitution. Under the school law in effect in 1867 and 1868, separate schools for colored children were required wherever there was a specified minimum number of such children in a district; where their number was less than the minimum, the local school authorities could admit them to the white schools or use their proportionate share of the school fund for having them taught in some other way. In 1871 the Supreme Court of Ohio held that the Fourteenth Amendment did not outlaw school segregation,

⁶⁹ North Carolina Public Documents, 1868-69, Doc. No. 1, Sess. 1868-69, pp. 8-9.

⁷⁰ Public Laws of North Carolina, 1868-69, ch. 184, sec. 50, p. 471.

⁷¹ Art. IX, sec. 2.

State ex rel. Garnes v. McCann, 21 Ohio St. 198. The Constitutional Convention of 1873-74 did not vote on a proposal to provide separate schools, with local option for mixed schools. Segregation in the public schools was abolished in 1887. Some laws discriminating against Negroes were repealed in 1849, but until the adoption of the Fifteenth Amendment Negroes were barred from voting and excluded from jury service. The miscegenation law was repealed in 1887.

RATIFICATION

Governor Cox in his message of January 2, 1867, to the 57th General Assembly⁷² recommended ratification, and said of the Amendment:

* * * It consists of several sections containing provisions which in the wisdom of the National Legislature are necessary to secure permanent peace throughout the country, and to correct the most palpable evils remaining in those States which were lately in rebellion; evils, which, without such correction would endanger the National safety, and be a lasting source of irritation and strife.

In examining the proposed amendment, its extreme moderation is, under all the circumstances of the country and the time, most remarkable. It contains four provisions, of which three would become ir-repealable and unchang[e]able except by

⁷² Ohio Doc., 1866, Part 1, pp. 263 *et seq.*

new amendment of the Constitution; but the other could be suspended or annulled by act of Congress.

The three former consist, *First*, of the grant of power to the National Government to protect the citizens of the whole country in their legal privileges and immunities, should any State attempt to oppress classes or individuals, or deprive them of the equal protection of the laws; *Second*: of the equitable equalization of representation * * *; and *Third*, of (the debt provisions.)

* * * * *

A simple statement of these propositions is their complete justification. The first was proven necessary long before the war, when it was notorious that any attempt to exercise freedom of discussion in regard to the system which was then hurrying on the rebellion, was not tolerated in the Southern States; and the State laws gave no real protection to immunities of this kind, which are of the very essence of free government. The necessity, also, of having somewhere a reserved right to protect the freedom of the slaves whom the war emancipated is too palpable for argument. If these rights are in good faith protected by State laws and State authorities, there will be no need of federal legislation on the subject, and the power will remain in abeyance; but if they are systematically violated, those who violate them will be themselves responsible for all the necessary interference of the central government.⁷³

⁷³ *Id.*, pp. 281-2.

On January 3, the Senate voted for ratification, without any debate.⁷⁴ The House concurred on January 4, by a vote of 54 to 25.⁷⁵

The Legislature of 1868 had a small Democratic majority in both branches,⁷⁶ while a Republican, Rutherford B. Hayes, was Governor. In his Inaugural Address, in January 1868, he alluded to a proposal to rescind ratification, saying in part

* * * I submit with confidence that nothing has occurred which warrants the opinion that the ratification by the last General Assembly of the Fourteenth Amendment to the Constitution of the United States, was not in accordance with the deliberate and settled convictions of the people. That amendment was, after the amplest discussion, upon an issue distinctly presented, sanctioned by a large majority of the people. If any fact exists which justifies the belief that they now wish that the resolution should be repealed, by which the assent of Ohio was given to that important amendment, it has not been brought to the attention of the public.⁷⁷

On January 11, the House of Representatives adopted a resolution to rescind ratification on the following grounds: ⁷⁸

The provisions of the said proposed amendment are *ex post facto* in their nature

⁷⁴ Sen. J., 1867, p. 9. The vote was 21 to 12.

⁷⁵ House J., 1867, pp. 12-13.

⁷⁶ *Appleton's Annual Cyclopaedia*, 1866, p. 600.

⁷⁷ Ohio Doc., 1867, Part 1, pp. 207-208.

⁷⁸ House Joint Resolution No. 1, House J., Jan., 1868, pp. 10-12.

and operation, and confer upon congress power to legislate on subjects foreign to original objects of the Federal compact;

The adoption of said resolution was a misrepresentation of the public sentiment of the people of Ohio, and contrary to the best interests of the white race, endangering the perpetuity of our free institutions.

The Senate substituted a resolution recommended by its Committee on Federal Relations, which was adopted on January 13, 1868, by a vote of 19 to 17.⁷⁹ The House concurred on the same day.⁸⁰ The Resolution declared:

* * * * *

AND, WHEREAS, Several distinct propositions are combined in the said proposed amendment, several of which are already fully provided for in the constitution of the United States, and to which no person or party objects; therefore, be it

*Resolved by the General Assembly of the State of Ohio, That the above recited resolution be, and the same is hereby rescinded, and the ratification, on behalf of the state of Ohio, of the above recited proposed amendment to the constitution of the United States, is hereby withdrawn and refused.*⁸¹

SCHOOLS

The Ohio Constitution of 1802 declared that education should be encouraged by the legislature (Art. VIII, Sec. 3); that no law was to be passed which would keep the poor from equal partici-

⁷⁹ Sen. J. 1868, pp. 33-39.

⁸⁰ House J. 1868, pp. 44-51. The vote was 56 to 46.

⁸¹ *Ibid.*; 65 Ohio Laws 280, 281.

pation in federally-supported schools (Art. VIII, Sec. 25); and that such schools were to be open "without any distinction or preference whatever * * *." (*Ibid.*)

School laws of 1821⁸² and 1825⁸³ initiated a system of public schools. The first racial references are found in the school law of 1831.⁸⁴ Under this statute a school fund was to be raised for the instruction of white children (Sec. 1) with the aid of a property tax, from which the property of "blacks and mulattoes" was exempted (Sec. 2). The schools in each district were to be open, for at least three months each year, to all white children residing in the district (Sec. 34).

Common schools for colored children were first provided by a statute enacted in 1848.⁸⁵ This statute permitted the organization of colored school districts, to be administered by the colored residents. However, it was superseded in 1849 by a law which made separate school mandatory wherever the local school authorities deemed it not expedient to admit colored children to the existing common schools; these separate schools were subject to the same laws and regulations as those governing the common schools.⁸⁶

Difficulties arose in Cincinnati when an attempt was made in 1850 to establish colored

⁸² 19 Ohio Laws 51.

⁸³ 23 Ohio Laws 36.

⁸⁴ 29 Ohio Laws 414.

⁸⁵ 46 Ohio Laws 81 (General Acts).

⁸⁶ 47 Ohio Laws 17.

schools. After the Negro residents had elected their school trustees, employed teachers and rented school houses, the city treasurer withheld the funds apportioned for the schools. He contended that the Negro trustees, not being electors, did not qualify as office holders under the Ohio Constitution, and hence could not draw any money from the city treasury.⁸⁷ The dispute was decided in favor of the Negro trustees in *State v. City of Cincinnati*, 19 Ohio St. 178 (1850). The Supreme Court of Ohio held that the constitutional requirements for voting and public office did not apply to school trustees. Subsequent legislation eliminated the colored trustees from the city's school administration⁸⁸ but in 1856 the Negro residents of the city again obtained the right to elect their own trustees.⁸⁹

The general school law of 1864, which was in force at the time of Ohio's ratification of the Fourteenth Amendment, authorized and required separate schools for colored children whenever their number in a district or in adjoining districts exceeded twenty; where the number of such children was less than twenty, or where distance made a separate school impracticable, a proportionate share in the school fund had to be appropriated for their education.⁹⁰

⁸⁷ See Special Report of the U. S. Commissioner of Education (1871), p. 371, House Exec. Docs., 41st Cong., 2d Sess., vol. 13, No. 315.

⁸⁸ 51 Ohio Laws 508; 52 Ohio Laws 48.

⁸⁹ 53 Ohio Laws 117. See also Special Report, *supra*, p. 372.

⁹⁰ 61 Ohio Laws 31 (1864), section 4, amending section 31 of the school law of 1853 (51 Ohio Laws 429), which had similar provisions for colored schools.

In 1859 the Supreme Court of Ohio, in *Van Camp v. Board of Education of Logan*, 9 Ohio St. 406, held that mulatto children were not entitled to enter the white common schools. The dissenting opinion declared that "caste-legislation" was inconsistent with the theory of a free and popular government "that asserted in its bill of rights the equality of all men" (p. 415).

The Commissioner of Common Schools, in 1868, described the situation in the State as follows:

Colored youths of legal school age, i. e., between the ages of 5 and 21 years, are entitled to the privileges of the public school fund. Colored youth cannot of legal right claim admittance to our common schools for white youth. The local school authorities may, however, admit a colored youth to the public schools for white youth, and as a matter of fact in the largest part of the State, the colored youth are admitted on equal terms with the white youth to the common or public schools.⁹¹

In 1871, the Supreme Court of Ohio held that the school segregation law of the State did not violate the Fourteenth Amendment. *State ex rel. Garnes v. McCann*, 21 Ohio St. 198. This appears to be the first case in which the highest court of a State passed on the effect of the Fourteenth Amendment on racial segregation in the schools. The court, discussing the question in terms of the "privileges and immunities" clause of the Amendment, concluded that school privileges derived from state law alone were not covered;

⁹¹ See Report of the Superintendent of Public Instruction of Indiana for 1867-68, pp. 25-26, Ind. Doc. 1867-1868.

the clause was limited to federal rights. In any event, according to the court, "separate but equal" facilities did not violate the "privileges and immunities" clause.

The decision in *State ex rel. Garnes v. McCann* played a prominent role in the discussion on schools which took place in the Constitutional Convention of 1873-74.⁹² The Committee on Education submitted a proposed constitutional provision that contained no reference to segregation.⁹³ Mr. Baber offered an amendment providing for separate schools for the two races, "so as to give each the equal benefit of a common school education," but with a local option for mixed schools.⁹⁴

In explanation, he said:

* * * One reason why I offer this amendment is that I concur very much in the views expressed by the gentleman from Hamilton [Mr. Carbery] and other gentlemen, that, if ever the school system of this State fails, it will be in consequence of the insane desire for a central bureau of education at Washington, for civil rights bills, and other means of interfering with the schooling of the children under State authority. I protest against it. I believe that it is the exclusive right of the State, and yet at the same time I am disposed to be as liberal as anybody. * * * Now, at once to end this controversy, at once to put

⁹² The Constitution drafted by the Convention was rejected by the electorate in 1874. See 3 Page's New Annotated Ohio General Code 6584 (1926).

⁹³ Ohio Constitutional Convention, 1873-74, Debates, vol. 2, pp. 2186 *et seq.*

⁹⁴ *Id.*, p. 2238.

this matter into the hands of the school districts of the State—because, I understand, that in the northern parts of the State, and also in a good many other places, where colored children are allowed to be admitted into the schools without any controversy—where a large majority of the electors desire that to be done, let it be done without any taxpayer coming forward and bringing suit for the purpose of stopping it by injunction. But on the other hand, I say that, where the people do not desire it to be done, and especially in my own locality, in the city of Columbus, where they have a large separate school, and where all the friends of education much prefer it, I do not want to see any sort of intermeddling. * * *

He continued:

* * * Now, what I want to call the attention of the Convention to is, to the claim that this interferes with the Fourteenth Amendment, under which claim this Congress of the United States, in pursuance of a cause of usurpation that it has been promising ever since the time, now attempts to come into the State and interfere with the right of Ohio to control her schools. With regard to that amendment the court says: [Quoting from pp. 209-210 of the opinion in the *McCann case*, *supra*.]

* * * * *

They go on, and, by argument, show that this is a matter for the State, that it is not one of the rights and immunities of citizens of the United States, under which broad scope of power Congress may sweep away all our rights and privileges. * * *

Mr. ALEXANDER. I presume that the amendment [to the report of the Committee of Education] is intended to remedy some evil. I would consequently ask whether the evil that he intends to remedy is the admission of colored children to the schools or their exclusion therefrom?

Mr. BABER. The evil I desire to remedy is in order to have the Constitution of Ohio stand up for its own citizens against Federal usurpation; that wherever they desire the admission of these children, I want them to come in; but when the people do not desire it, I do not want them forced to break up the common schools. Is the gentleman answered?

Mr. ALEXANDER. Yes, sir.⁹⁵

There was no further debate on this issue. The proposed amendment was not submitted to a vote by the Convention.

In 1887 the provision of the school law regarding segregated schools was repealed.⁹⁶

LEGAL STATUS OF NEGROES

The law of 1849^{96a} which provided for the establishment of colored schools, also repealed the "black laws" of 1804,⁹⁷ 1807⁹⁸ and 1834,⁹⁹ together with all provisions of other acts insofar as they created any disabilities or conferred any special privileges on account of color. There were excepted, however, the act of 1831 relating to juries and the poor law of 1831.

⁹⁵ *Id.*, pp. 2238-39, 2240-41.

⁹⁶ 84 Ohio Laws 34.

^{96a} 47 Ohio Laws 18.

⁹⁷ 2 Ohio Laws 63.

⁹⁸ 5 Ohio Laws 53.

⁹⁹ 32 Ohio Gen. Laws 22.

Until the adoption of the Fifteenth Amendment Negroes were barred from voting and from jury service.¹ A law making miscegenation a misdemeanor, passed in 1861,² was repealed in 1887 by the same act which abolished separate schools.³

OREGON

Oregon ratified the Fourteenth Amendment in October, 1866, but rescinded its ratification in October, 1868. There had been no racial distinctions in the schools of the state since their inception. The Constitution of 1857 excluded from the state all Negroes not already resident. Negroes were barred from the polls and juries. The legislature which ratified the Fourteenth Amendment shortly thereafter prohibited miscegenation.

RATIFICATION

In September, 1866, the Governor recommended that the Legislature ratify the Fourteenth Amendment as "a matter of the greatest importance."⁴ In his Inaugural Address on September 12, he proclaimed that the "States' rights" theory was dead, slavery had perished, and that the fruits of victory must not be yielded up:

Can any truly loyal man object to, or could the rebels themselves expect less, than the repudiation of the rebel debt, to pledging the national faith for the payment of the federal debt, to the securing in the full exercise

¹ Const. 1851, Art. V, sec. 1; Ohio, Rev. Stats., 1870, c. 62, sec. I.

² 58 Ohio Laws 6.

³ 84 Ohio Laws 34.

⁴ House J., 1866, App., p. 427.

of all their civil rights, of all persons in the republic * * *? The terms are eminently just and proper * * * [the proposed constitutional amendment] founded in justice and right * * * merits your highest admiration.⁵

The Senate voted for ratification on September 14.⁶ The House, after a favorable report of its Judiciary Committee,⁷ followed on September 19.⁸

In 1868, after the Republican Party had been defeated in the election, the Legislature rescinded its ratification. A Joint Resolution introduced in the Senate on September 16, 1868,⁹ recited that the legislatures of the Southern states which had ratified the Amendment "were created by a military despotism against the will of the legal voters of the said states under the reconstruction acts (so called) of Congress, which are usurpatrous, unconstitutional, revolutionary and void." The resolution was adopted on October 5.¹⁰ In the House the resolution was passed on October 15.¹¹

SCHOOLS

In his message to the Legislature in 1866, in which he recommended adoption of the Fourteenth Amendment, the Governor discussed at length the subject of education.¹² He mentioned the "unjus-

⁵ House J., 1866, pp. 29-30.

⁶ Sen. J., 1866, pp. 35-36.

⁷ House J., 1866, p. 72.

⁸ *Id.*, p. 77.

⁹ Sen. J., 1868, pp. 32-37.

¹⁰ *Id.*, p. 131.

¹¹ House J., 1868, pp. 270-273.

¹² House J., 1866, App., pp. 432 *et seq.*

tifiable failure to meet the wants of the rising generation" and of the "wretched condition of our present common school system," and advocated a revision of the school laws and the creation of an independent department of public instruction. In his Inaugural Address,¹³ he urged establishment of a general system of good common school education "within the reach of every child, rich or poor, within the State."

Schools were established while a territorial government existed. These were free to all children.¹⁴ After Oregon became a state, the same provision was written into its school law of October 17, 1862.¹⁵ The Constitution of 1857, under which Oregon was admitted in 1859, stated that

Provision shall be made by law for the distribution of the income of the common school fund among the several counties of the state, in proportion to the number of children resident therein between the ages of four and twenty years.¹⁶

There was no legislation containing any reference to racial distinctions in the public schools. The school law of 1872¹⁷ provided that public schools "shall be free to all persons between the ages of four and twenty years, residing [in the district]" (Sec. 46).

LEGAL STATUS OF NEGROES

The Oregon Constitution of 1857, in its Bill of Rights, provided that

¹³ House J., 1866, p. 30.

¹⁴ Ore. Stats., 1853-55, p. 466.

¹⁵ Ore. General Laws, 1845-1864, c. 5, tit. II, sec. 24.

¹⁶ Const. 1857, Art. VIII, Sec. 4.

¹⁷ Ore. Laws, 1872, p. 145.

No free negro or mulatto, not residing in this state at the time of the adoption of this constitution, shall come, reside or be within this state, or hold any real estate, or make any contracts, or maintain any suit therein; * * * ¹⁸

The Constitution also restricted the franchise to white males.¹⁹ The Civil Code, adopted in 1862, likewise limited jury service to white males.²⁰

In 1866 the Legislature which had a month earlier ratified the Fourteenth Amendment enacted a statute prohibiting marriage of whites with Negroes, Chinese, Kanakas, and Indians.²¹

PENNSYLVANIA

Pennsylvania ratified the Fourteenth Amendment in February, 1867, after extended debate from which it appears that both its supporters and opponents believed that the "privileges and immunities" and "equal protection" clauses were to be interpreted broadly. Provision for racially segregated schools had been made in 1854. In 1881 an inferior court held that these provisions violated the Fourteenth Amendment. *Commonwealth ex rel. Allen v. Davis*, 10 Weekly Notes of Cases 159 (1881). The law was repealed a month later. Racial segregation in homes for soldiers' orphans was required by a law enacted shortly after Pennsylvania ratified the Fourteenth Amendment. In 1867, almost concurrently with its ratification of the Fourteenth

¹⁸ Const. 1857, Art. I, sec. 35.

¹⁹ Art. II, sec. 2.

²⁰ Ore. Gen. Laws, 1843-1872, Civ. Code, c. 12, title 1, sec. 918.

²¹ Ore. Laws, 1866, p. 10.

Amendment, the Pennsylvania legislature prohibited racial discrimination by railroad companies. The sponsor of that measure indicated that Negro equality demanded integrated schools. Pennsylvania excluded Negroes from the franchise and from juries until 1870.

RATIFICATION

Pennsylvania ratified the Fourteenth Amendment in the legislative session which began January, 1867. Extensive debates took place both in the Senate (January 14, January 17) and in the House (January 23, 30).²² On January 17, the Senate voted for ratification, 21 to 11.²³ On February 6, the House concurred by a vote of 62 to 34.²⁴

Neither the message of Governor Curtin, in which he recommended ratification,²⁵ nor the Inaugural Address of his successor, Governor Geary,²⁶ discussed the Amendment in detail. Governor Curtin referred to the election of 1866, which, he said, showed that a large majority of the people favored the Amendment. To him, this was not surprising, since the Amendment was nothing but a restatement of long established principles:

That every person, born in the United States and free, whether by birth or manumission, is a citizen of the United States,

²² Pennsylvania is the only state which published *verbatim* reports of legislative debates.

²³ Sen. J., 1867, pp. 125-126.

²⁴ House J., 1867, pp. 278-279.

²⁵ Sen. J., 1867, pp. 16-18; Pa. Leg. Rec., 1867, pp. 9-10.

²⁶ Sen. J., 1867, pp. 105-6.

and that no State has a right to abridge the privileges of citizens of the United States—these are principles which were never seriously doubted anywhere, until after the insane crusade in favor of slavery had been for some time in progress. What is called the decision of the Supreme Court of the United States, in the *Dred Scott* case, has made it expedient and proper to re-assert these vital principles in an authoritative manner, and this is done in the first clause of the proposed amendments.²⁷

Both in the Senate and the House there were extended debates. These indicate that both the supporters of the Amendment and the opposition believed that the "privileges and immunities" and "equal protection" clauses should be interpreted broadly. Some supporters argued that the purpose of the first section of the Amendment was to implement the Declaration of Independence. Thus, Mr. Day stated in the House debate that

We propose, in the first place, to write, in substance, the civil rights bill * * * Put all upon an equality before the law. Put it in black and white in the organic law that negroes have rights which white men are bound to respect—the rights to life, liberty and property; in short, the inalienable rights enunciated in the Declaration of Independence, not to be accepted as "glittering generalities," but as original, self-evident truths * * * ²⁸

²⁷ *Id.*, p. 16.

²⁸ Pa. Leg. Rec., 1867, App., p. LXV. See also the speeches of Landon in the Senate (p. IX), and of Mann (p. XLVIII) and Kinney (p. LIV) in the House.

Others stated that it was designed to give full effect to the Thirteenth Amendment. Senator Bigham, for example, declared:

* * * the whole of these four articles of this amendment are simply carrying out the last section of the amendment of two years ago. Everyone of them arose out of the condition of things in reference to that amendment abolishing slavery.²⁹

Most of the speakers expressed their understanding of the effect of the Amendment in terms of broad principles rather than with regard to specific applications. Thus, according to Senator Taylor, the first section met the "universal demand" "to destroy all legal caste within our borders";³⁰ Senator Bigham said that since the Negroes' response to the call to arms, "it has been only a question of time how soon all legal distinction will be wiped out".³¹ Senator Landon stated the object of the first section to be "complete justice to the colored race,"³² and defined this more specifically as follows:

* * * You ask me: What do you want for the colored man? I reply, do you let the white rebel go to school? I claim that the colored man shall go to school; do you protect the white man before the law, you shall protect the colored man before the same law; do you punish a crime in a colored man, you shall punish the same in

²⁹ *Id.*, p. XVI. Similarly, M'Creary in the House, *id.*, p. LXXI.

³⁰ *Id.*, p. XXII.

³¹ *Id.*, p. XVII.

³² *Id.*, p. IX.

a white man in the same way; and a virtue that will reward a white man shall be rewarded in the colored man.³³

Mr. Jenks, opposing ratification, made the following statement in the House:

By the first section it is intended to destroy every distinction founded upon a difference in the caste, nationality, race or color of persons who have been or may be born in and subject to the jurisdiction of the United States, which has found its way into the laws of the Federal or State Governments which regulate the civil relations or rights of the people. No law shall be made or executed which does not secure equal civil rights to all. In all matters of civil legislation and administration there shall be perfect legal equality in the advantages and securities guaranteed by each State to every one here declared a citizen, without distinction of race or color, every one being equally entitled to demand from the States and State authorities full security in the enjoyment of such advantages and securities.³⁴

Representative Rhoads, also in opposition, said that the effect of the Amendment would be to recognize the Negro "as the equal, politically and socially, of the white man."³⁵

One of the principal objections raised against the Amendment was that it granted wide powers to Congress. Senator Wallace said:

* * * negroes are citizens, and no State shall say they are not the equal of the white

³³ *Ibid.*

³⁴ *Id.*, p. XLI.

³⁵ *Id.*, p. LIV.

man in every sense. Privilege means "everything that it is desirable to have." Immunity—"a privileged freedom from anything painful." By the one we obtain an actual good, by the other, the removal of an evil. When the power to enforce these privileges and immunities in favor of the negro is vested in Congress, is it possible to conceive of any of the dearest rights of which we are possessed, that Congress may not bestow upon him also? Equal protection of the law, and the rights of life, liberty and property, with the right to enforce them by appropriate legislation by Congress, gives the power to enact laws regulating and controlling the liberty or property of the citizen and providing for equal protection of the law. If this be the power granted, what further need have we of the State government? * * * ³⁶

According to Representative Jenks,

By [the first section], in connection with the fifth section, the regulation of the civil relations of each State is placed under the control of the Federal Government, the States to be used simply as instruments to execute its will, and nearly their entire civil and criminal jurisdiction placed under the control of Congress.³⁷

While the Fourteenth Amendment was being discussed in the House, the Senate had under consideration a bill prohibiting racial discrimina-

³⁶ *Id.*, p. XIII.

³⁷ *Id.*, p. XLI. Some members denied that section 1 gave Congress the power to confer suffrage upon the Negroes. See Senator Landon, *id.*, p. IX; Representative Wright, *id.*, p. LXXXIV.

tion by railway companies.³⁸ The sponsor of the bill was Senator Lowry, who had supported the ratification of the Fourteenth Amendment in the Senate. He stated that the bill was "one of many rights which we must bestow upon [the Negroes]"³⁹ and,

In all things we must give the colored man on this continent an equal chance with ourselves in his struggle for life and for immortality. If he fills our pulpits, our schoolhouses, our academies, our colleges and our Senate chambers, I bid him God speed.⁴⁰

SCHOOLS

The Constitution of 1790 provided for the establishment of schools throughout the State, "in such manner that the poor may be taught gratis," and for the promotion of the arts and sciences "in one or more seminaries of learning." (Art. VII, Secs. 1, 2.) These clauses were incorporated in the Constitution of 1838 (Art. VII, Secs. 1, 2), in effect when Pennsylvania ratified the Fourteenth Amendment. The school laws of the early 1800's were designed for a system of pauper schools.⁴¹ A general system of tax-supported public schools was initiated by the school law of 1834.⁴²

³⁸ Pa. Leg. Rec., 1867 (Feb. 5), pp. 212 *et seq.*

³⁹ Pa. Leg. Rec., 1867, App., p. LXXXIV.

⁴⁰ *Ibid.*

⁴¹ Wickersham, *A History of Education in Pennsylvania* (1886), pp. 282, *et seq.*

⁴² Pa. Laws, 1833-34, No. 102. According to Wickersham, Thaddeus Stevens, then a member of the Pennsylvania legislature, in 1835 saved the law from repeal. *Op. cit.*, pp. 332 *et seq.*

In his Report to the Legislature for the year 1866-1867, the Superintendent of Common Schools stated that

* * * Since 1834 our schools are open to all and free to all. * * *

* * * * *

In * * * other countries, sex, race, color is allowed to make a difference in educational privileges.

A common school system recognizes no such unjust distinctions or discriminations in respect to education. The great principle that underlies such a system is, that since God made all minds capable of being educated, it is their right to be educated—to be educated to the highest degree practically attainable.⁴³

The laws of Pennsylvania at that time provided for separate schools for colored children. The school law of 1854 “authorized and required the directors of the several districts

to establish, within their respective districts, separate schools for the tuition of negro and mulatto children, whenever such schools can be so located as to accommodate twenty or more pupils; and whenever such separate schools shall be established, and kept open four months in any year, the directors or controllers shall not be

⁴³ Report, p. XXXVII, Pa. Ex. Doc., 1867.

⁴⁴ Pa. Laws, 1854, No. 610, p. 617. In 1869, “An Act consolidating the wards of the city of Pittsburgh for educational purposes,” Pa. Laws, 1869, No. 133, p. 150 (Feb. 12, 1869), provided for segregated schools. The clause in section 54 excluding colored persons was repealed in 1872. Pa. Laws, 1872, No. 999, p. 1048.

compelled to admit such pupils into any other school of the district: *Provided*, That in cities or boroughs, the board of controllers shall provide for such schools out of the general funds assessed and collected by uniform taxation for educational purposes (sec. 24).

Commenting on this provision, J. P. Wickersham, Superintendent of Common Schools from 1866 to 1881, said that

* * * Previously, such [colored] children were received into any public school at which they presented themselves; but the prevailing prejudice against them was so great that many preferred rather to remain away from school altogether than to face it. The provision for separate schools was practically a boon to the colored people, although it probably grew out of an indisposition to permit their children to attend school with white children.⁴⁵

In 1870 the Superintendent published the following rulings concerning the rights of colored children under section 24 of the school law of 1854:

No. 180. The twenty colored children necessary to constitute a school of this class are to reside within reasonable distance of the proposed point. If that number, or even more, are scattered over the whole district but so far from each other that twenty cannot attend the same school, the school is not to be established.

No. 181. If the requisite number (20) cannot be collected into one school, there

⁴⁵ *Op. cit.*, p. 506.

is no provision in the law which excludes them from the white schools.

No. 182. Colored schools are to have the same duration of instruction as the white schools, and are not to be closed in all cases at the end of 4 months.⁴⁶

Ruling No. 181 was upheld by the Court of Common Pleas for Luzerne County in 1873, in *Commonwealth ex rel. Brown v. Williamson*, 10 Phila. 490. The court held that where there were less than 20 colored children in a district they must be admitted to the same public school as the whites. The court was of the opinion that the Fourteenth Amendment had no bearing on the case:

In the case before us, we fail to discover that any great constitutional question is involved, or that any right of the relator, or his children, growing out of the fourteenth amendment to the Constitution of the United States, or under the civil rights bill, has been challenged, invaded, or denied (p. 492).

In 1881, in *Commonwealth ex rel. Allen v. Davis*, 10 Weekly Notes of Cases 156, the Court of Common Pleas of Crawford County held that the provision for separate schools (section 24 of the school law of 1854) violated the Fourteenth Amendment, and also that it was "virtually under the prohibition of the XIIIth Amendment," since it made a distinction which put a "badge of servitude" on the Negroes and involved "the very personification of caste" (p. 160).

⁴⁶ *The Common School Laws of Pennsylvania and Decisions of the Superintendent* (1870).

One month later, a law was enacted "to abolish all distinction of race or color in the public schools."⁴⁷

Section 2 of that law expressly repealed section 24 of the school law of 1854.

In the Senate, the sponsor of the bill said that

In proposing the repeal of the act of 1854, which, in terms would be prohibited by the present State or Federal Constitutions, it seems a matter of surprise that an act so directly in conflict with the fourteenth and fifteenth amendments of the Constitution of the United States should have been permitted to have remained on the statute book until this time. * * * It is to the discredit of the United States and of Pennsylvania that any discrimination on account of color should have existed in our statutes * * *.

It is the right and heritage of all of our citizens, that their children shall participate in [the school law's] benefits without restriction. To uphold or permit a color line of distinction is not only unjust in itself, but in conflict with the plain provisions of the Constitution.⁴⁸

He then stated that Acting School Commissioner Lindsey in 1872 had declared the provision for separate schools inoperative,⁴⁹ and continued:

I have placed this enactment upon the ground of right, and as required by the provisions of the fundamental law.

* * * * *

⁴⁷ Pa. Laws, 1881, No. 83, p. 76.

⁴⁸ Pa. Leg. Rec., 1881, p. 1943.

⁴⁹ This ruling is not incorporated in the various editions of *The Common School Laws of Pennsylvania and Decisions of the Superintendent.*

I am happy to believe that, on the part of many, it has been more from inattention than design that this statute has been left unrepealed, and that, with the majority of law makers, a mere suggestion of its existence will be sufficient to induce its repeal.⁵⁰

The Senate voted unanimously for the bill.⁵¹ Mr. Landis, its sponsor in the House, stated that the measure was required by the Fifteenth Amendment.⁵² In *Kaine v. The Commonwealth*, 101 Pa. St. 490 (1882), the Supreme Court of Pennsylvania held that under this statute any assignment of pupils to schools on the basis of color was unlawful.

The question of school segregation was discussed shortly after the ratification of the Fourteenth Amendment in connection with the establishment of homes for soldiers' orphans. The Senate, in March, 1867, passed a bill which provided for separate school and homes for the orphans of colored soldiers,

subject to the same regulations and restrictions provided in relation to the education and maintenance of the orphans of our white soldiers and sailors.⁵³

In the House, Representative M'Creary proposed an amendment eliminating segregation and authorizing the admission of Negro children to any such home. He stated that his amendment was justified by reasons of justice and equality; that

⁵⁰ Pa. Leg. Rec., 1881, p. 1943.

⁵¹ *Id.*, pp. 1943-44.

⁵² *Id.*, p. 2190.

⁵³ Pa. Leg. Rec., 1867, pp. 598-9.

if the homes were segregated many colored children could not be taken care of because their number in some areas did not warrant separate homes. He also stated that the same discrimination existed in regard to the public schools.^{53a} His proposal met with opposition. One member said that

We are bound to respect the rights of the negro race, so far as liberty, and property, and educating them is concerned * * *

but he owed it to his constituents to protest against this proposal.⁵⁴ Representative Meyers pointed out that

* * * The Republican members of the Senate seemed to think that sufficient justice would be done to the orphans of colored soldiers by giving them the means of being educated in separate schools. Why should we not be satisfied with the action of the Senate and the committee, on this matter? ⁵⁵

Mr. M'Creary withdrew his amendment.⁵⁶ Throughout the debate on this and other proposed amendments to the segregation clause there was no reference to the Fourteenth Amendment.

LEGAL STATUS OF NEGROES

Article III, Section 1 of the 1838 Constitution restricted the franchise to white males, and continued in force until the Fifteenth Amendment was adopted.⁵⁷ Prior to 1867, juries were se-

^{53a} *Id.*, App., p. CCCXLII.

⁵⁴ *Id.*, pp. CCCXLIV-CCCXLV.

⁵⁵ *Id.*, p. CCCXLV.

⁵⁶ *Id.*, p. CCCXLVI.

⁵⁷ Pa. Laws 1870, No. 33, sec. 10 (April 6).

lected from "taxable citizens,"⁵⁸ but in April of that year, when the jury law was revised, the qualifications were narrowed to "electors."⁵⁹ In 1865, the Legislature had rejected a proposal "to extend to all American citizens of African descent, and all persons of color, the same privileges as are now extended to white citizens in attending places of public amusement, worship, and meeting * * *,"⁶⁰ and also a bill to prohibit racial discrimination by the railways of the commonwealth.⁶¹ In 1867, shortly after it had ratified the Fourteenth Amendment, the Legislature adopted a bill forbidding racial segregation by railroad companies,⁶² having rejected an amendment to permit separate cars.⁶³ The opposition argued that the bill meant "social equality,"⁶⁴ while its supporters stated that "social equality" differed from

a man's natural, civil and political rights to life, liberty and property, and equal suffrage with which to protect them.⁶⁵

An amendment incorporating the provisions of the proposed 1865 bill prohibiting racial discrimination in places of public amusement and worship was defeated.⁶⁶

⁵⁸ Purdon's Digest, 9th ed., 1700-1861, p. 580, sec. 8.

⁵⁹ Pa. Laws, 1867, No. 41, sec. 2.

⁶⁰ Pa. Leg. Rec., 1865, p. 146.

⁶¹ *Id.*, p. 712.

⁶² Pa. Laws, 1867, No. 21.

⁶³ Pa. Leg. Rec., 1867, p. 214.

⁶⁴ *Id.*, p. 217.

⁶⁵ *Id.*, App., p. CVI.

⁶⁶ *Id.*, pp. 585-6.

RHODE ISLAND

RATIFICATION

Rhode Island ratified the Fourteenth Amendment on February 12, 1867,⁶⁷ by a vote of 26 to 2 in the Senate, and 60 to 9 in the House.⁶⁸

SCHOOLS

Prior to 1866, the Rhode Island statutes provided that

No person shall be excluded from any public school, in the district to which such person belongs, if the town is divided into districts, or if not so divided, from the nearest public school, on account of being over fifteen years of age, nor except by force of some general regulation applicable to all persons under the same circumstances, and in no case on account of the inability of himself, his parents, guardian or employer, to pay any rate bill, tax or assessment whatever.⁶⁹

There existed two separate schools for colored children in Providence. These had been established in the 1830's, but by 1865 they were described as presenting a "vexed question", which had engaged the attention of the city's School Committee for many years.⁷⁰ At the end of 1866

⁶⁷ Acts and Resolves, 1867, p. 161. There are no printed journals of the Rhode Island legislature for this time. The original journal references are 25 Senate Journal, 1865-68, and 41 House Journal, 1866-69, February 7, 1867.

⁶⁸ McPherson, *Reconstruction* (1871), p. 194.

⁶⁹ Rhode Island, Rev. Stats., 1857, Tit. XIII, C. 71, Sec. 1.

⁷⁰ 21st Annual Report on Public Schools, App., pp. 4-5. R. I. Doc., 1866, App. No. 3.

it was reported that the legislature had abolished "caste schools" in accordance with the "rapidly changing sentiment of the people in regard both to slavery and the colored race."⁷¹ On March 7, 1866, a law had been enacted providing that

In deciding upon applications for admission to any school in this State, maintained wholly or in part at the public expense, no distinction shall be made on account of the race or color of the applicant.⁷²

LEGAL STATUS OF NEGROES

The first constitution of the state, adopted in 1842, conferred suffrage upon all male citizens.⁷³ Eligibility for jury duty depended basically upon the right to vote.⁷⁴ There was no discrimination against the Negro as a witness.

Marriage between whites and Negroes was prohibited until 1881.⁷⁵

SOUTH CAROLINA

The South Carolina legislature convened under the Reconstruction Constitution ratified the Fourteenth Amendment in July 1868, reversing the state's earlier rejection of December 1866. The same constitution, adopted in 1868, provided for

⁷¹ 22d Annual Report on Public Schools, App., p. 7, R. I. Doc., 1867.

⁷² Rhode Island, Acts and Resolves, Jan. 1866, C. 609, Sec. 1.

⁷³ Rhode Island Constitution, 1842, Art. II, Sec. 1.

⁷⁴ Rhode Island, Rev. Stats., 1857, Tit. XXV, C. 172, Sec. 1.

⁷⁵ Rhode Island, Rev. Stats., 1857, Tit. XX, C. 134, Sec. 6, repealed, Public Laws, Jan. 1881, C. 846.

a system of public schools and declared that all schools "supported in whole or in part by the public funds, shall be free and open to all the children and youths of the State, without regard to race or color." Two governors of the state in 1868 interpreted this as permitting separate schools. Although the implementing legislation was silent on this specific question, it did provide for an enumeration of children classified according to race and sex. Two colleges in the state were opened to Negroes. In 1895, the state constitution was amended to provide expressly for racially segregated schools.

RATIFICATION

South Carolina rejected the Fourteenth Amendment in December, 1866. Among the arguments given by Governor Orr in his message transmitting the amendment to the Legislature and recommending its rejection were the following:

Do not its first and last sections, if adopted, confer upon Congress the absolute right of determining who shall be citizens of the respective States, and who shall exercise and enjoy any and all of the rights, privileges and immunities of citizenship? * * * With this amendment incorporated in the Constitution, does not the Federal Government cease to be one of "limited powers" in all of the essential qualities which constitute such a form of Government? Nay, more; does not its adoption reverse the well-approved doctrine, that the United States shall exercise no powers, unless expressly delegated by the Constitution? ⁷⁶

⁷⁶ House Journal, 1866, p. 34.

The Committee on Federal Relations recommended rejection; its report contained no discussion or reasons for the recommendation.⁷⁷ Both Houses concurred.⁷⁸

The Legislature convened under the Reconstruction Constitution ratified the amendment in July, 1868, without debate.⁷⁹

SCHOOLS

In South Carolina there had been since 1834 a system of public schools supported by state appropriations, intended for the poor but open to the children of every "citizen."⁸⁰ Except in Charleston, however, appropriations were inadequate, and private education was the rule for children of those who could afford it. The public schools were open only to whites. After 1834, it was forbidden to teach slaves to read or write, and free persons of color were forbidden to maintain schools for either slaves or freedmen.⁸¹

During the early Reconstruction period schools for Negroes were established by philanthropic organizations, and in Charleston the public schools were reopened, with separate rooms for white and colored.⁸²

⁷⁷ South Carolina Reports and Resolutions, 1866, p. 220.

⁷⁸ House Journal, 1866, p. 284; Senate Journal, 1866, p. 230.

⁷⁹ Senate Journal, 1868, p. 12; House Journal, 1868, p. 50.

⁸⁰ Teaching slaves to read was prohibited. South Carolina Laws, 1834, ch. 5, sec. 1.

⁸¹ Knight, *Public Education in the South* (1922), pp. 215-228.

⁸² Special Report of the Commissioner of Education, p. 385, House Exec. Docs., 41st Cong., 2d Sess., vol. 13, No. 315.

The Constitution of 1868 contained the following provisions:

ARTICLE X

SEC. 3. The general assembly shall, as soon as practicable after the adoption of this constitution, provide for a liberal and uniform system of free public schools throughout the State, and shall also make provision for the division of the State into suitable school districts. There shall be kept open, at least six months in each year, one or more schools in each school district.

SEC. 4. It shall be the duty of the general assembly to provide for the compulsory attendance, at either public or private schools, of all children between the ages of six and sixteen years, not physically or mentally disabled, for a term equivalent to twenty-four months, at least: *Provided*, That no law to that effect shall be passed until a system of public schools has been thoroughly and completely organized, and facilities afforded to all the inhabitants of the State for the free education of their children.

SEC. 10. All the public schools, colleges, and universities of this State, supported in whole or in part by the public funds, shall be free and open to all the children and youths of the State, without regard to race or color.

In his message to the Constitutional Convention of 1868, Governor Orr had urged that provision be made for education of the colored people, but did not refer to the question of mixed schools:

Education is now the great desideratum of all the colored people of South Carolina.

For obvious reasons it was the policy of the State, previous to emancipation, to exclude the slave population from the benefits and advantages of education. I will not discuss these reasons. But the relations of that population to the State are now materially changed. Hence it is of the utmost importance that the largest intelligence possible shall be communicated to that class. Men of intelligence have many more opportunities, through their reading and observation, of learning and appreciating the moral law and its requirements. Profound ignorance, almost universally coupled with it crime and vice. Hence, the education of the black population—and, I am sorry to say, of many of the white population of the State—should command the earnest attention of this body.⁸³

The Committee on Education had before it proposals for mixed schools,⁸⁴ and also a proposal stating merely that “* * * no discrimination * * * be made in favor of any class of persons.”⁸⁵ The Committee reported a proposed article on education containing the above provisions in substantially the same form as finally adopted.⁸⁶ The article on education was debated fully,⁸⁷ with a later debate on the question of mixed schools.⁸⁸

In the extensive debate on the requirement of compulsory education, the question of separate

⁸³ Convention Proceedings, p. 51.

⁸⁴ *Id.*, pp. 71, 100.

⁸⁵ *Id.*, p. 88.

⁸⁶ *Id.*, pp. 265-6.

⁸⁷ *Id.*, pp. 685-709.

⁸⁸ *Id.*, pp. 889-94, 899-901.

or mixed schools was raised. Mr. A. C. Richmond stated:

* * * If the word "compulsory" remains, it will be impossible to enforce the law for sometime to come. We say the public schools shall be opened to all. Every school district will have its school houses and its teachers. There is to be a particular school fund, school districts, and school houses. * * * There must be schools to which colored children can go; but we wish to look into the propriety of compelling parents to send their children to school. I believe the efforts of the teachers, preachers, and all those interested in the welfare of the State, and the efforts of all those interested in the welfare of the colored people, will bring out nearly all the colored children. I believe nearly all the colored children of the State will go to school. We have societies that will help to furnish the books; we have preachers who are much interested; we have missionaries, all of whom are interested in this class of our people, and who will see to it that the colored children are educated, so that settles that point. The next point is, how are the white children going to school? By means of moral suasion nearly all the colored children will be brought to school; and by means of white schools, nearly all the white children will go to school and be educated. It will regulate itself. The word "compulsory" is used to compel the attendance of children in one or the other class of schools.⁸⁹

In support of the Committee's recommendation, a member pointed out that

⁸⁹ *Id.*, pp. 690-1.

If anyone chooses to educate their children in a private school, this law does not debar them from that privilege.⁹⁰

Mr. F. L. Cardozo, of the Committee on Education, stated in support of the proposal that

Before I proceed to discuss the question, I want to divest it of all false issues, of the imaginary consequences that some gentlemen have illogically thought will result from the adoption of this section with the word compulsory. They affirm that it compels the attendance of both white and colored children in the same schools. There is nothing of the kind, and no such construction can be legitimately placed upon it. It simply says all the children shall be educated; but how is left with the parents to decide. It is left to the parent to say whether the child shall be sent to a public or private school. The eleventh section has been referred to as bearing upon this section. I will ask attention to this fact. The eleventh section does not say, nor does the report in any part say there shall not be separate schools. There can be separate schools for white and colored. It is simply left so that if any colored child wishes to go to a white school, it shall have the privilege to do so. I have no doubt, in most localities, colored people would prefer separate schools, particularly until some of the present prejudice against their race is removed.

We have not provided that there shall be separate schools; but I do not consider these issues as properly belonging to the question. * * *⁹¹

⁹⁰ *Id.*, p. 694.

⁹¹ *Id.*, p. 706.

The later debate on the provision for mixed schools included Mr. Duncan's objection that the provision would impede the education of the poor whites:

* * * Now, what is likely to be the result of retaining this section, and thereby opening the public schools to all? Simply, that they would be attended only by the colored children. If the attempt is made to enforce a mixture in this way, I have no idea that fifty white children in the State would attend the public schools. The freedmen's schools are now, if I mistake not, open to all; and yet I believe not one white pupil in the State attends them. The result would be exactly the same with our public schools. This is a state of affairs that we should certainly desire to avoid. In the first place, the poor white children would be deprived of any chance of education. They would continue ignorant and degraded and prejudiced. The whites who have means would send their children to private schools, but the poor whites would be as heretofore, unable to do so. * * *

* * * Certainly, if we look at the condition of the country, we will see the necessity of adopting such measures as will secure the education of the white people as well as of the colored. It is estimated that from twenty to thirty per cent of the grown up white men of South Carolina are unable to read or write.⁹²

Mr. Wright construed the section as permitting separate schools:

* * * The gentleman who last resumed his seat has referred to the impropriety of

⁹² *Id.*, pp. 890-893.

allowing the children of the two races to attend school together. If I read the section aright, it contemplates no such thing. It simply says, "all schools, colleges, etc., supported by public funds, shall be open to all classes, without regard to race, color or previous condition." * * * This provision leaves it so that white and colored children can attend school together, if they desire to do so; but I do not believe that colored children will want to go to the white schools, or *vice versa*. I think there will be separate schools established, and there is no clause in our Constitution that prevents it; therefore I hope this clause will be adopted exactly as it is. * * *⁸³

The final argument was made by Mr. Cardozo:

I think the opinion of the members is so fully established on this subject, that elaborate argument is unnecessary. I shall briefly notice some of the points made by the gentleman from Newberry (Mr. B. O. DUNCAN.)

His first point is, that this provision runs counter to the prejudices of the people. To my mind, it is inconsistent that such an argument should come from a member of the Convention, or from one who favored the reconstruction scheme of Congress. The whole measure of reconstruction is antagonistic to the wishes of the people of the State, and this section is a legitimate portion of that scheme. It secures to every man in this State full political and civil equality, and I hope members will not commit so suicidal an act as to oppose the adoption of this section.

⁸³ *Id.*, pp. 893-894.

The gentleman from Newberry said he was afraid we were taking a wrong course to remove these prejudices. The most natural method to effect this object would be to allow children; when five or six years of age, to mingle in schools together, and associate generally. Under such training, prejudice must eventually die out; but if we postpone it until they become men and women, prejudice will be so established that no mortal can obliterate it. This, I think, is a sufficient reply to the argument of the gentleman under this head.

We have carefully provided in our report that every one shall be allowed to attend a free school. We have not said there shall be no separate schools. On the contrary, there may be separate schools, and I have no doubt there will be such in most of the districts. In Charleston, I am sure such will be the case. The colored pupils in my school would not like to go to a white school. Without flattery, I think I may say I have not seen as good a public school in Charleston as my own. We have as able a corps of teachers as any in the country. They have come from the North, adopted teaching as their profession, and they will not, in point of efficiency, yield to any teachers in the State.

In sparsely settled country districts, where perhaps there are not more than twenty-five or thirty children, separate schools may be established; but for ten or fifteen white children to demand such a separation, would be absurd; and I hope the Convention will give its assent to no such proposition.²⁴

²⁴ *Id.*, pp. 900-901.

Mr. Cardozo's remark that "this section is a legitimate portion of" the reconstruction scheme is the only specific reference to the reconstruction acts in the debates on education. Throughout the Convention, however, references were made to the fact that "* * * We are to frame a Constitution in accordance with the reconstruction acts under which we are operating" and to the requirement that the Fourteenth Amendment be ratified.⁹⁵ Almost the next order of business after Mr. Cardozo's remarks was the adoption of an ordinance directing the legislature to be elected under the new constitution to ratify the Fourteenth Amendment.⁹⁶

The provision in the South Carolina constitution was construed by Governor Orr in his message to the Legislature on July 7, 1868, as permitting separate schools.⁹⁷ His successor, Governor Scott, on July 10, 1868, also recommended the establishment of separate schools. He did not refer specifically to constitutional provisions, but stated that

While the moralist and the philanthropist cheerfully recognizes the fact that "God hath made of one blood all nations of men," yet the statesman, in legislating for a political society that embraces two distinct, and, in some measure, antagonistic races, in the great body of its electors, must, as far as the law of equal rights will permit, take cognizance of existing prejudices among both.⁹⁸

⁹⁵ *Id.*, pp. 561, 218, 513, 833.

⁹⁶ *Id.*, pp. 904-6.

⁹⁷ House Journal, 1868, p. 44.

⁹⁸ *Id.*, p. 62.

The 1870 legislation to provide for schools did not specify either separate or mixed schools,⁹⁹ although it did provide for an enumeration of the children in each school district, classified as male and female, white and colored (sec. 38).

"An Act to Incorporate the Claflin University" of December 18, 1869,¹ prohibited discrimination:

SEC. 5. No instructor in said University shall ever be required by the Trustees to have any particular complexion or to profess any particular religious opinions as a test of office, and no student shall be refused admission to, or denied any of the privileges, honors, or degrees of, said University on account of race, complexion or religious opinions which he may entertain: Provided, nevertheless, That this Section, in reference only to religious opinions shall not apply to the theological department of said University.

South Carolina College was opened to Negroes at this time.²

In 1895 the Constitution was amended to require segregated schools. Act. XI (7).

TENNESSEE

Tennessee ratified the Fourteenth Amendment in July 1866 over opposition which feared the measure would give Negroes the right to vote, hold office, sit upon juries and intermarry with whites, and "obliterat[e] all distinctions in regard to races * * *." A year later the Legislature

⁹⁹ South Carolina Acts, 1870, No. 238, p. 339.

¹ South Carolina Acts, 1869-70, No. 193.

² Knight, *op. cit.*, p. 373.

established a common school system reserved to whites, while making provision for Negro education only "as far as practicable." In 1869 separate schools were formally established. Two months before ratifying the Fourteenth Amendment, the Legislature had "defined" the rights of Negroes, repealing in large part the "Black Code," but retaining the right to exclude Negroes from juries and to maintain separate schools. The Negro was enfranchised in 1870, shortly before the Fifteenth Amendment became effective.

RATIFICATION

A special session was called to consider the Fourteenth Amendment. Governor Brownlow, in his Proclamation of June 19, 1866,³ stated that the Amendment established

equal protection of all citizens in the enjoyment of life, liberty and property.

His message to the Legislature on July 6, 1866,⁴ summarized the first section of the Amendment in these terms:

By the first section, equal protection in the enjoyment of life, liberty and property, is guaranteed to all citizens. Practically, this affects mainly the negro, who having been emancipated by the rebellion, and having lost that protection which the interest of the master gave him, became by the very laws of nature, entitled to the civil rights of the citizen, and to the means of enforcing those rights.

³ Sen. J., Called Session, 1866, p. 4.

⁴ *Id.*, p. 8.

To deny this to him, would be to place his life, property and labor in the power of every unfriendly local authority, or evil disposed person, and would be an instance of barbarism unworthy of the age. It will also prevent unjust and oppressive discrimination by one State against the citizens of other States.

Representative Leftwich, a Tennessee member of Congress, in an open letter to the Legislature in opposition to the Amendment dated June 26, 1866,^{*} stated as follows on the subject of equality:

We have done very much for the negro in giving him freedom, and all the civil rights necessary to its full enjoyment. We do not object to seeing him, if he is able, come up to perfect equality with our race, but we *will not* consent to lowering our race to an equality with him.

In the Senate, a proposal to submit the matter of ratification to the people was defeated.^{*} The Senate also voted against an amendment to the resolution proposing ratification. This amendment read as follows:

Provided, that the foregoing proposed amendments * * * shall not be so construed as to confer the right of suffrage upon a negro, or person of color, or to confer upon such negro or person of color the right to hold office, sit upon juries, or to intermarry with white persons; nor shall said proposed amendments be so construed as to prohibit any State from enacting and enforcing

^{*} MacPherson's *Scrap Book, Fourteenth Amendment*, p. 16.

^{*} Sen. J., Called Session, 1866, p. 18.

such laws as will secure these ends, not inconsistent with the present Constitution of the United States, nor * * * to abridge the reserved rights of the States in the election and qualification of their own officers, and the management of their domestic concerns, as provided and secured by the present Constitution of the United States.⁷

The Senate voted for ratification on July 11, 1866.^{7a}

For a while no quorum could be obtained in the House, because several members absented themselves. Finally, two members were apprehended, brought to the Legislature and counted as present. The ratifying resolution was passed on July 19, 1866.⁸ Representative Jarvis filed a protest in which he stated that the Amendment "obliterates all distinctions in regard to races."^{8a}

SCHOOLS

Legislation enacted in 1867⁹ established a common school system for white children and provided for special schools for colored children "as far as practicable," *i. e.*, when their number in a district exceeded twenty-five; if their number was below fifteen, the money raised based upon their number was to be used for educating them in a manner to be determined by the board of education.

⁷ *Id.*, p. 23.

^{7a} *Id.*, p. 24.

⁸ House J., Called Session, 1866, pp. 23-25; McPherson's *Scrap Book, Fourteenth Amendment*, pp. 18-19.

^{8a} House J., Called Session, 1866, pp. 37-38.

⁹ Tenn. Laws, 1867, Chapter XXVII.

The school law was revised in 1869 to provide as follows:

SECTION 4. That the schools for white children and for colored children shall be kept separate and apart from each other and the School Commissioners from each district will observe strictly this requirement.

SECTION 6. That the taxes levied and collected by the respective counties under the provisions of this Act shall not be used for any other purposes than that of education, and shall be denominated the Common School Fund for said county; provided the school fund raised by each county shall be equally distributed pro rata among the white and colored scholastic population of the county.¹⁰

The Constitution of Tennessee, adopted in 1870, prohibited white and colored children from attending the same public school (Article 11, section 12). The same prohibition was written into section 30, Chapter 25 of the Public Acts of 1873.

In his Annual Report for the school year 1873-74 the State Superintendent of Public Instruction discussed the question of segregated schools in connection with the supplemental Civil Rights Bill then pending before Congress.¹¹ He declared that without the provision for separate schools for colored children no system of public schools would have been adopted and that if segregation were prohibited, the entire system would be destroyed.

¹⁰ Tenn. Laws, 1869-1870, Chapter XXXIII.

¹¹ Report of the Superintendent of Public Instruction, 1873-74, pp. 25-30, II Sen. J., 1875, App.

LEGAL STATUS OF NEGROES

In May, 1866, two months before the Tennessee legislature ratified the Fourteenth Amendment, it had enacted a measure to define the rights of "persons of color."¹² These included the rights

to make and enforce contracts, to sue and be sued, to be parties and give evidence, to inherit, and to have full and equal benefits of all laws and proceedings for the security of the person and estate, and [they] shall not be subject to any other or different punishment, pains or penalty, for the commission of any act or offense, than such as are prescribed for white persons * * *.

Negroes who were blind, deaf, dumb, lunatics, paupers, or apprentices were given "full and perfect benefit and application of all laws regulating and providing for white persons" in the same condition. It was expressly declared, however, that the statute was not to be construed as allowing Negroes to serve on juries, or requiring their education in the same schools with whites. The Act repealed all prior inconsistent legislation.

The Constitution of 1870, adopted shortly before the Fifteenth Amendment was declared in force, gave the Negro the right to vote.¹³ Also included in the Constitution was a prohibition of intermarriage between whites and Negroes.¹⁴

TEXAS

The Texas legislature rejected the Fourteenth Amendment in October 1866, in part because it

¹² Tenn. Laws, 1865-66, c. XL.

¹³ Art. IV, sec. 1. The former constitution, adopted in 1835, had restricted suffrage to whites. Art. IV, sec. 1.

¹⁴ Art. XI, sec. 14.

was thought to give Congress the power to "declare almost any right or franchise whatever, to be the privilege or immunity of a citizen of the United States * * *." In February 1870 the Amendment was ratified without debate. Although the Constitution of 1866 contemplated a separate system of schools for Negroes, no provision for Negro education was then made. The Constitution of 1870 was silent on segregation; legislation in 1870 and 1871 indirectly authorized separate schools, and in 1873 such schools were made mandatory.

RATIFICATION

The 1866 legislature refused to ratify the Fourteenth Amendment, in part because of its disfranchisement of those engaged in rebellion and also because it was thought to grant Congress the power to give to the freedmen rights which the legislature believed they should not have. In the House, the report of the Committee on Federal Relations, recommending rejection, stated in part

The first section proposes to deprive the States of the right which they have possessed since the revolution of 1776 to determine what shall constitute citizenship of a State, and to transfer that right to the Federal Government. Its object is, provided the section shall become a part of the Constitution, under the color of a generality, to declare negroes to be citizens of the United States, and therefore, citizens of the several States, and as such entitled to all "the privileges and immunities" of white citizens; in these privileges would be embraced the exercise of suffrage at the polls,

participation in jury duty in all cases, bearing arms in the militia, and other matters which need not be here enumerated. It is unnecessary to appeal to the fact that in most of the original free States, negroes have been by law, and in all of them by immemorial usage, excluded from these "privileges and immunities," now sought to be forced on the Southern States, to show that the amendment proposed in this section contemplates and intends a violation not only of justice, but of the common instincts of our nature. * * *

There is scarcely any limit to the power sought to be transferred by this section from the States to the United States. Congress might declare almost any right or franchise whatever, to be the privilege or immunity of a citizen of the United States and it would immediately attach to every citizen of every State, whether white man or descendant of African. To estimate the comprehensive scope of the power herein sought for Congress—that body might declare miscegenation a privilege or immunity. * * *¹⁵

The Amendment was rejected on October 13, 1866, by a vote of 70 to 5.¹⁶

The report of the Senate Committee on Federal Relations was similar.¹⁷ The Amendment was rejected by the Senate on October 27, 1866, by a vote of 27 to 1.¹⁸

After the adoption of the Constitution of 1870, the first legislature elected thereunder ratified

¹⁵ House Journal, 1866, p. 578.

¹⁶ *Id.*, p. 584.

¹⁷ Senate Journal, 1866, pp. 417-423.

¹⁸ *Id.*, p. 471.

the Fourteenth Amendment at a provisional session in February 1870, without discussion.¹⁹

SCHOOLS

In Texas there had been no occasion to consider public education for Negroes prior to 1865. There had been constitutional and statutory provision for public education, but those had not in practice led to an effective system of free public education even for white children.²⁰ The first Constitution, in 1836, recognized the obligation of the government for education, providing in Section 5 that

It shall be the duty of congress, as soon as circumstances will permit, to provide by law a general system of education.

The 1845 Constitution was more detailed:

ARTICLE X

Sec. 1. A general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be the duty of the legislature of this State to make suitable provision for the support and maintenance of public schools.

Sec. 2. The legislature shall, as early as practicable, establish free schools throughout the State, and shall furnish means for their support by taxation on property * * *.

By a statute enacted in 1854 there was set aside a fund of \$2,000,000 United States 5% bonds,

¹⁹ Senate Journal, Prov. Sess., Feb., 1870, p. 29; House Journal, Prov. Sess., Feb., 1870, p. 33.

²⁰ See Knight, *Public Education in the South* (1922), p. 261.

the interest of which was to be allotted to counties on the basis of the "free white population" between the ages of six and sixteen years in each county, for the payment of teachers only.²¹ By 1860 there were 1,218 public schools in the State, not free, but with the patrons paying tuition.²² During the War the school fund was dissipated.²³

The Constitution of 1866 provided that the public-school fund be set aside for the education of the "white scholastic" population, and contemplated a separate system for "Africans" to be supported from taxes on them.²⁴ In fact, the legislature of 1866 made no provision for education of Negroes. The act authorizing the sale of public school lands belonging to counties specified that the interest on the proceeds be applied to "payment of the tuition of all the white scholastic population" in the county.²⁵ Allotments from the public school fund were to be on the basis of "the free white population."²⁶ Another "Act to provide for the education of the indigent white children" by payment of tuition provided that Africans or descendants of Africans and their property were exempted from local taxation for the purpose of this act.^{26a} The few schools for Negroes were under the supervision of the Freedmen's Bureau.²⁷

²¹ Texas Laws, Fifth Legislature, 1853-54, c. 18, p. 17.

²² Knight, *op. cit.*, pp. 258-61.

²³ Superintendent's Report, Convention Journal I, p. 65.

²⁴ Art. X, secs. 1, 2, 7.

²⁵ Laws of Texas, 1866, ch. 79, p. 74.

²⁶ Laws of Texas, 1866, ch. 146, p. 170.

^{26a} Laws of Texas, 1866, c. 154, p. 195.

²⁷ Special Report of the Commissioner of Education (1871), p. 390, House Exec. Docs., 41st Cong., 2d Sess., vol. 13, No. 315.

The Constitutional Convention which was elected pursuant to the Reconstruction Act of 1867 was advised by the Governor that

It is not my province to make recommendations for your action; but I trust that it will not be considered improper for me to suggest that, in the constitution you are about to form, it is expected—

That you will declare that the pretended act of secession and all laws that have been enacted in aid of the late rebellion, or repugnant to the Constitution and laws of the United States, are and were null and void from their inception; and that you will at once repeal all laws that make any discrimination against persons on account of their color, race or previous condition;

* * * *

That you will secure equal civil and political rights to every inhabitant of the State who has not forfeited these rights by participation in the late rebellion, or by conviction for crime;

* * * *

That you will make a liberal provision, by taxation upon property, for the immediate establishment of Free Public Schools for the education of every child in the State; * * * ²⁸

* * * *

Insofar as education is concerned, the Convention had before it a report of the Superintendent of Public Schools outlining the history and status of education in the State and recommending a reservation of public lands solely for school purposes, a constitutional provision to protect the

²⁸ Constitutional Convention Journal, I, pp. 14-15.

school fund, and additional state control over the educational system:

Thus, while the paramount law ordains that there *must* be a system of free primary schools, open to the entire youth of the State, it may properly refer to the Legislature the settlement of the details thereof; the construction of buildings, the salary of teachers, the method of instruction, the question of separate or mixed schools, the plan of supervision, and the whole apparatus of the law.²⁹

The Constitution, as adopted, contained the following provisions, recommended by the Convention's Committee on Education:

ARTICLE IX

Section 1. It shall be the duty of the legislature of this State to make suitable provision for the support and maintenance of a system of public free schools, for the gratuitous instruction of all the inhabitants of this State between the ages of six and eighteen years.

* * * * *

Sec. 4. The legislature shall establish a uniform system of public free schools throughout the State.

Sec. 5. The legislature, at its first session, (or as soon thereafter as may be possible,) shall pass such laws as will require the attendance on the public free schools of the State of all the scholastic population thereof, for the period of at least four months of each and every year:

²⁹ *Id.*, I, p. 71.

Provided, That when any of the scholastic inhabitants may be shown to have received regular instruction, for said period of time in each and every year, from any private teacher having a proper certificate of competency, this shall exempt them from the operation of the laws contemplated by this section.

* * * * *

Sec. 9. The legislature shall at its first session (and from time to time thereafter, as may be found necessary), provide all needful rules and regulations for the purpose of carrying into effect the provisions of this article. It is made the imperative duty of the legislature to see to it that all the children in the State, within the scholastic age, are, without delay, provided with ample means of education. The legislature shall annually appropriate for school purposes, and to be equally distributed among all the scholastic population of the State, the interest accruing on the school-fund, and the income derived from taxation for school purposes; * * *

The original Report of the Committee on Education, consisting of a proposed constitutional provision, contained no reference to separate or mixed schools.³⁰ An amendment to the report to require separation was tabled by a vote of 36 to 30.³¹ Another, by Mr. Schuetze of the Committee on Education, was adopted by a vote of 48 to 12.³² A proposed proviso to permit mixed schools where separate schools were not established was tabled

³⁰ *Id.*, I, pp. 609-14.

³¹ *Id.*, I, p. 896.

³² *Id.*, I, p. 898.

by a vote of 40 to 20.³³ Proposals to specify that separation be discretionary were tabled by votes of 38 to 22³⁴ and 38 to 27,³⁵ and the Schuetze amendment again approved, 52 to 14.³⁶ The proposed article was subsequently recommitted to the Committee on Education.³⁷ That Committee reported back that it would not change its original report, which contained no reference to separation.³⁸ The article was adopted as originally reported.³⁹

Governor Davis in his message of April 29, 1870, recommended some provision for education, but made no reference to Negroes or to the Amendment:

Next in importance to the measures necessary to the establishment of law and order, you will find the question of providing for the education of the children of the State. No better civilizer has been found than a liberal system of education * * *

* * * there is a special necessity for education in our country where the government depends upon the people themselves. The success of Republican institutions and universal suffrage is assured by universal education.⁴⁰

The legislature on August 13, 1870, enacted a law concerning public schools which made no direct

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Id.*, I, p. 912.

³⁶ *Ibid.*

³⁷ *Id.*, II, p. 146.

³⁸ *Id.*, II, p. 229.

³⁹ *Id.*, II, pp. 417-21.

⁴⁰ Senate Journal, April 1870, p. 16.

reference to the question of separate schools. Among other matters, it provided that the County Court should act as a board of school directors and that "they may make any separation of the students or school necessary to insure success, so as not to deprive any student or students of scholastic benefits, except for such misconduct as demands expulsion."⁴¹

The Act of 1871 was similarly indirect, in providing that

* * * the Board of Education for this State shall prescribe no rule or regulation that will prevent the directors of the school districts from making any separation of the students that the peace and success of the school and the good of the whole may require.⁴²

In 1873 the trustees were directed to prepare separate lists of white and colored children, and to separate "the children" and so arrange "the schools and school houses that good order, peace and harmony may be maintained in the schools."⁴³

The Constitution of 1876 specified that

Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both. (Article VII, Sec. 7)

LEGAL STATUS OF NEGROES

The failure to provide education prior to 1870 was a part of the general treatment of freed-

⁴¹ Texas Laws, 1870, ch. 68, p. 113.

⁴² Texas Laws, 1871, ch. 54, sec. 3, p. 58.

⁴³ Texas Laws, 1873, ch. 63, pp. 84, 90.

men as a separate class."⁴⁴ An 1866 act concerning "persons heretofore known as slaves, and free persons of color" gave them the rights to contract, sue, inherit, buy and sell property, and to "have and enjoy the rights of personal security, liberty, and private property." However, they could not marry whites, serve on juries, hold office, vote, and, except in limited instances, testify in court.⁴⁵ Another statute enacted the same year provided that

every Railroad Company heretofore incorporated or which may hereafter be incorporated, by the Legislature of this State, shall be required to attach to each passen-

⁴⁴ The Attorney General of the State resigned in 1868 because he was unwilling to take an oath which recognized as "laws" of Texas the Constitution of 1866 and the Acts of the Legislature of 1866. He prepared several opinions on their unconstitutionality, copies of which were printed for distribution to the members of the Convention (Convention Journal, I, p. 129). In his opinion on the "pretended legislation" of 1866 he listed 22 statutes and two joint resolutions which he declared to be unconstitutional, as aimed directly at the freedmen and opposed to the Civil Rights Act and the Thirteenth Amendment. The law defining "persons of color" was objectionable because its "sole object * * * was to defeat equality before the law—justice; to discriminate on account of race." The law defining the rights of "persons of color" was "Subject to the same objection. It was, he said, restrictive, giving them no more rights than free persons of color had during the existence of African slavery; it takes special care not to declare them to be 'citizens.'" He described as in violation of the United States Constitution the laws concerning schools, that providing for separate railroad cars, and those restricting jury service and the militia to whites. (*Id.*, I, p. 953 ff.)

⁴⁵ Laws of Texas, 1866, ch. 128, p. 131.

ger train run by said Company, one car for the special accommodation of Freedmen.⁴⁶

In 1871, the latter act was superseded by one that declared

That the equality of all persons before the law is herein recognized, and shall ever remain inviolate, nor shall any person ever be deprived of any right, privilege or immunity, nor be exempted from any burdens or duty on account of race, color or previous condition.

SEC. 2. That all public carriers in this State are hereby prohibited, in accordance with the above and foregoing section, from making any distinctions in the carrying of passengers * * *⁴⁷

In the same year Negroes were made eligible to testify in court.⁴⁸

VERMONT

RATIFICATION

The Republican state convention on June 20, 1866, indicated some dissatisfaction that the Fourteenth Amendment did not go farther than it did, stating:

That, while approving the constitutional amendment lately proposed by Congress as a present practical measure toward securing just ends, we yet insist that every scheme of restoration is imperfect that is not based upon equal and exact justice to all, and the equal rights, personal, civil,

⁴⁶ Laws of Texas, 1866, ch. 102, p. 97.

⁴⁷ Laws of Texas, 1871, 2d Sess., ch. 21, p. 16.

⁴⁸ Laws of Texas, 1871, 1st Sess., ch. 104, p. 108.

and practical, of all loyal citizens, irrespective of color or race; * * *."

The Governor referred the Amendment to the Legislature in his address of October 12, 1866.⁴⁹ While the Amendment was under discussion in the House, it was again suggested that the Amendment was not strong enough. It was regretted

that the amendment was so imperfect as it was; that the first article which seems to make such abundant provision for securing every right of every citizen of the United States in each of the States, should in the last article make provision for recognizing the disfranchisement of 4,000,000 of citizens, principally in the States yet to be admitted. He thought the principles enunciated in the first article could and ought to be interpreted as securing each and every political and civil right to each citizen;

Mr. Hubbard stated that if this were not so, he would propose a joint resolution addressed to Congress seeking such an amendment.⁵¹ Mr. Woodbridge explained

that if it was not all that ought to be given it was all that could now be done. It made Southern and Northern representation in Congress on nearly equal terms. It encouraged Southerners to educate and enfranchise blacks.⁵²

⁴⁹ *Appleton's Annual Cyclopaedia*, 1866, pp. 761-2.

⁵⁰ House J., 1866, pp. 32-34.

⁵¹ (Windsor) *Vermont Journal*, Oct. 27, 1866, p. 2, col. 1.

⁵² *Ibid.*

The Legislature ratified the Amendment, 28 to 0 in the Senate,⁵³ and 196 to 11 in the House.⁵⁴

SCHOOLS AND LEGAL STATUS OF NEGROES

The public school system in Vermont dates from its beginnings as a state, and seems never to have had racial segregation.⁵⁵ No laws discriminating against the Negro have been found. In reply to an inquiry from the Superintendent of Public Instruction of Indiana, in 1868, the Vermont Superintendent of Schools wrote:

I am happy to say that the negro in Vermont is under no disabilities, nor has he ever been. Neither constitution nor statute recognizes any distinction based upon race or color.⁵⁶

VIRGINIA

Virginia rejected the Fourteenth Amendment in January, 1867 with only one dissenting vote. In October, 1869, it was ratified without debate. Negro education, proscribed before the war, was at the time of ratification restricted to a few schools established by benevolent societies and supported by the Freedmen's Bureau. The Constitution of 1870, drafted in 1867 and 1868, was

⁵³ Sen. J., 1866, p. 75. The Journal states that the Appendix contains the report of the Senate Committee recommending ratification. The Appendix, however, does not contain that report.

⁵⁴ House J., 1866, p. 139.

⁵⁵ See Vt. General Stats., 1863, tit. 13, c. 22; Vt. Revised Laws, 1880, tit. 10.

⁵⁶ See Report of the Indiana Superintendent of Public Instruction, 1867-1868, p. 24. Ind. Doc., 1867-68.

silent on segregation in schools. The statute creating a uniform school system in 1870 specified segregation.

RATIFICATION

Governor Pierpoint in a message of December 3, 1866, recommended ratification of the Fourteenth Amendment.⁵⁷ As to the scope of the Amendment, he said:

There is no ambiguity in the language of the proposed amendment: it is before you for your mature consideration—for adoption or rejection: you are fully acquainted with all the circumstances which led to its proposal. The congress of the United States has made its acceptance a condition precedent to the admission of representatives, in the councils of the nation, from states now unrepresented.⁵⁸

The General Assembly rejected the amendment by a vote of 74 to 1 in the House⁵⁹ and 27 to 0 in the Senate.⁶⁰

Ratification in 1869, after the Amendment had been adopted, was perfunctory. Governor Walker's message of October 5, 1869, stated merely that

The 5th section of the act of congress of March 2d, 1867, among other things, declares "That when said state, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the constitution of the United States proposed by the thirty-ninth congress, and

⁵⁷ Senate Journal, 1866-67, pp. 28-34.

⁵⁸ *Id.*, p. 29.

⁵⁹ House Journal, 1866-67, p. 108.

⁶⁰ Senate Journal, 1866-67, p. 103.

known as Article Fourteen, and when said article shall have become a part of the constitution of the United States, said state shall be declared entitled to representation in congress, and senators and representatives shall be admitted therefrom, on their taking the oath prescribed by law." This law is still in full force, and Virginia was named in the preamble to the act as one of the states to which it was to be applied. It will be necessary, therefore, for you to comply with the condition therein named, although Article Fourteen has already been ratified by the requisite number of states, and has been officially proclaimed as a part of the constitution of the United States. A copy of the resolution of congress proposing Article Fourteen to the legislature of the several states is herewith submitted.⁶¹

Action in the Senate was in accord with the recommendation:

Mr. Herndon, from the select committee to whom was referred the governor's message, submitted the following report:

"The committee to whom was referred the governor's message, with instructions to report what action, if any, should now be taken upon the subjects therein mentioned, respectfully report that, after a conference with the house committee on the same subject, they agreed to report the two accompanying bills, one ratifying the fourteenth amendment to the constitution of the United States, and the other ratifying the fifteenth amendment to the same, with a recommendation that they do pass.

(Signed) CHARLES HERNDON, *Chairman*

* * * * *

⁶¹ Senate Journal, 1869, p. 18.

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* * * * *

⁶¹ Senate Journal, 1869, p. 18.

No. 1, A bill to ratify the joint resolution of congress passed June 16th, 1866, proposing an amendment to the constitution of the United States of America, was taken up, read the first and ordered to be read a second time; and on motion of Mr. Hern- don (two-thirds concurring), was read the second time, and was ordered to be en- grossed and read a third time; and being forthwith engrossed, was, on his further motion (two thirds concurring), read the third time; and the question on the pass- age of the bill was put and determined in the affirmative—ayes 36; noes 4.⁶²

Similar action followed in the House:

A message was received from the senate by Mr. Patterson, who informed the house of delegates that the senate had passed No. 1 senate bill, entitled, "An act to ratify the joint resolution of congress, passed June 16th, 1866, proposing an amendment to the constitution of the United States of America;" in which they respectfully re- quest the concurrence of the house of dele- gates.

The speaker laid before the house senate bill No. 1, as requiring immediate atten- tion. It was read the first and second times.

On motion of Mr. Crenshaw, the rule was suspended requiring its reference to a committee.

Mr. Budd moved that senate bill No. 1 be read a third time this day, which was agreed to, two-thirds of the members elect to the house of delegates concurring.

The bill was read a third time and passed—yeas 126; nays 6.⁶³

⁶² *Id.*, pp. 26-27.

⁶³ House Journal, 1869, p. 37.

Public schools in the ante-bellum period were predominantly of the "pauper" type. A permanent public-school fund, the so-called literary fund, was established in 1810,⁶⁴ and a year later its purpose was defined to be the "education of the poor".⁶⁵ Beginning in 1818, a fixed annual sum from the income of the fund was appropriated for the education of poor children.⁶⁶ In some cities and towns, and perhaps a dozen counties, the so-called free-school system was adopted, which was supported by local taxation.⁶⁷

Negroes, both slave and free, were prevented by law from obtaining any education. The Code of 1819⁶⁸ prohibited "all meetings or assemblages of slaves, of free negroes or mulattoes mixing and associating with such slaves, at any meeting-house or houses, or any other place or places, in the night, or at any school or schools for teaching them reading and writing, either in the day or night." The penalty for any violation was twenty lashes. Schools for free Negroes, which had been tolerated in Richmond, Norfolk and other cities⁶⁹ were suppressed in 1831. All meetings of free Negroes or mulattoes for teaching purposes were declared unlawful as-

⁶⁴ Va. Laws 1809-10, ch. 14.

⁶⁵ Va. Laws 1810-11, ch. 8.

⁶⁶ Va. Laws 1817-18, ch. 11.

⁶⁷ Va. Code 1849, ch. 82. The preceding chapter dealt with "schools for indigent children" (ch. 81). See Knight, *Public Education in the South* (1922), p. 209.

⁶⁸ Va. Rev. Code 1819, ch. 111, sec. 15.

⁶⁹ Special Report of the U. S. Commissioner of Education (1871), p. 394, House Exec. Docs., 41st Cong., 2d Sess., vol. 13, No. 315.

semblies, and any colored participant was liable to corporal punishment; white persons teaching such groups were punishable by fine and imprisonment.⁷⁰ These laws were incorporated with a few changes in the Criminal Code.⁷¹

Beginning in 1861, schools for freedmen were established by benevolent associations⁷² and later supported by the Freedmen's Bureau.⁷³

The Virginia Constitution of 1870, approved by popular vote on July 6, 1869, was drawn up in a convention held in 1867 and 1868. It provided

That all citizens of the State are hereby declared to possess equal civil and political rights and public privileges (I, 20).

It required the General Assembly to establish a free school system, but did not refer to the question of separation:

The general assembly shall provide by law, at its first session under this constitution, a uniform system of public free schools, and for its gradual, equal, and full introduction into all the counties of the State by the year eighteen hundred and seventy-six, or as much earlier as practicable (VIII, 3).

In the convention, proposals to require separate schools were rejected.⁷⁴ A contrary proposal to require mixed schools was also rejected.⁷⁵

⁷⁰ Va. Laws 1831, ch. 39, secs. 4-6.

⁷¹ Va. Code 1849, ch. 198, secs. 31-32.

⁷² Special Report, p. 395.

⁷³ *Id.*, pp. 396 *et seq.*

⁷⁴ Convention Journal, pp. 299, 301, 308, 336.

⁷⁵ *Id.*, pp. 333, 340.

The General Assembly in enacting "An Act to Establish and Maintain a Uniform System of Public Free Schools," approved July 11, 1870," specifically provided for segregation:

The public free schools shall be free to all persons between the ages of five and twenty-one years, residing within the school district; * * * provided, that white and colored persons shall not be taught in the same school, but in separate schools, under the same general regulations as to management, usefulness, and efficiency. * * * (Sec. 47.)

This was repeated in subsequent acts.⁷⁶ In 1902 a Constitution was adopted, containing a provision that

White and colored children shall not be taught in the same school (Sec. 140).

WEST VIRGINIA

The West Virginia legislature ratified the Fourteenth Amendment in January, 1867. Segregation, authorized from the establishment of the school system in 1863, was required after 1866, and embodied in the 1872 constitution. The constitutional provision was later held not to violate the Fourteenth Amendment. *Martin v. Board of Education*, 42 W. Va. 514 (1896). As a prerequisite to admission to the Union, West Virginia had instituted in 1863 a gradual emancipation of slaves, but Negroes were not permitted to vote, serve on juries, or marry whites; restric-

⁷⁶ Va. Laws, 1869-70, ch. 259, p. 402.

⁷⁷ Va. Laws, 1871-72, ch. 370; Va. Laws, 1876-77, ch. 38.

tions on their competence as witnesses, however, were removed in 1866.

RATIFICATION

The Governor submitted the Fourteenth Amendment for ratification on January 15, 1867. He stated that it left the question of Negro suffrage open and urged its ratification.⁷⁸ Upon the reading of the Governor's message in the Senate, a joint resolution ratifying the Amendment was introduced; by vote, the ordinary reference to committee was omitted, and the resolution passed by a vote of 15 to 3.⁷⁹ The House of Delegates, which on January 15 had tabled a resolution ratifying the Amendment,⁸⁰ passed the Senate's proposal on January 16, by a vote of 43 to 11.⁸¹

SCHOOLS

The Free Schools Act of 1863, passed at the first session of the Legislature after the admission of West Virginia as a state, provided separate schools for colored children, but did not in terms prohibit their education together with whites.⁸² In 1866, the Legislature passed a school law requiring segregation,⁸³ and reaffirmed this on February 27, 1867, six weeks after it had ratified the Fourteenth Amendment.⁸⁴ The Constitution of 1872 expressly incorporated a segregation require-

⁷⁸ Sen. J., 1867, p. 19.

⁷⁹ *Id.*, p. 23.

⁸⁰ House J., 1867, pp. 7-8.

⁸¹ *Id.*, p. 11.

⁸² W. Va. Acts, 1863, c. 137, sec. 17.

⁸³ W. Va. Acts, 1866, c. 74, sec. 26.

⁸⁴ W. Va. Acts, 1867, c. 98, sec. 19.

ment.⁶⁵ This provision was upheld in 1896 against challenge under the Fourteenth Amendment. *Martin v. Board of Education*, 42 W. Va. 514.

The Report of the Superintendent of Schools dated December 8, 1866, contains the following remark:

Owing to the fact that these freedmen are widely separated, their school privileges are necessarily limited.⁶⁶

LEGAL STATUS OF NEGROES

When the Constitution of West Virginia was first submitted to Congress for approval, it contained a provision that no slave or free Negro could enter the state to take up permanent residence. This was changed to apply to slaves only, and a further provision added that all children born of slaves after July 4, 1863, were to be free; all children of slaves under 10 years of age at that time would become free upon attaining the age of 21; and all children of slaves between 10 years and 21 years of age would become free upon attaining the age of 25.⁶⁷ Voting was restricted by the Constitution to white males.⁶⁸ Negroes were excluded from juries by statute until the decision in *Strauder v. West Virginia*, 100 U. S. 303. However, Negroes were permitted to appear as witnesses in the same manner as

⁶⁵ Art. XII, section 8.

⁶⁶ Report of Superintendent of Schools, p. 15, House J., 1867, Appendix.

⁶⁷ Const., 1863, Art. XI, section 7. See also 12 Stat. 634.

⁶⁸ Const., 1863, Art. III, section 1.

whites.⁸⁰ Miscegenation was prohibited under a Virginia statute, which was carried over into the laws of West Virginia.⁸⁰

WISCONSIN

In February, 1867, Wisconsin ratified the Fourteenth Amendment. A minority report in the Senate objected that the Amendment transferred to Congress legislative powers theretofore reserved to the states. Wisconsin schools had been open to all children since the admission of the state in 1849. In 1866 it was held that a law enacted in 1849 conferred the franchise on Negroes.

RATIFICATION

The Fourteenth Amendment was presented to the Legislature by Governor Fairchild in his address of January 9, 1867, in which he urged ratification.⁸¹

The Senate referred the Amendment to its Committee on Federal Relations, which reported favorably on January 22.⁸² The majority report contained no discussion of the scope of the Amendment, but the minority commented at length, stating in part:

The apparent object of the proposed amendments is to declare the Africans lately in servitude in the southern states of

⁸⁰ W. Va. Acts, 1866, c. 89.

⁸⁰ W. Va. Code, 1870, c. 149, section 8.

⁸¹ Sen. J., 1867, pp. 32 *et seq.*

⁸² *Id.*, p. 96.

this republic; citizens, and to give to the Congress of the United States the power to make them citizens of the several states wherein they reside, and thereby to extend to them the right of suffrage, and, also, to give to Congress the power to legislate for the citizens of the several states. The object accomplished, if the amendments are ratified, will be a surrender of certain rights and powers which the several states of the union now hold by their sovereign power in trust over the persons and property of their citizens to the federal government, so as to make it the arbiter between the states and the citizens and resident [sic] thereof.⁹³

* * * * *

The first section, in connection with the fifth, will give to the federal government the supervision of all the social and domestic relations of the citizens in the state and to subordinate state governments to federal power.⁹⁴

The minority report also questioned the authority of Congress as it was then constituted to propose the Amendment.

The Senate voted for ratification on January 23, by a vote of 22 to 10.⁹⁵ The Assembly followed on February 7, by a vote of 69 to 10.⁹⁶

There was some debate in both houses. Senator Hadley, in expressing his approval of the first section, "thought it already provided for in the

⁹³ *Ibid.*

⁹⁴ *Id.*, p. 98.

⁹⁵ *Id.*, p. 119.

⁹⁶ Assembly Journal, 1867, p. 224.

constitution."⁷⁷ General Hobart, in the Assembly, made a statement to the following effect:

No State shall deprive any person of life, liberty or property without due process of law, or the equal protection of law.—He could see no objection to this proposition; and none could be urged, unless it tended to give too much power to the Supreme Court of the United States. It would prevent any attempt at secession in the future. * * * Under this proposition all persons will be equal before the law."

Assemblyman Dyer explained:

The first [section] defines some of the rights of citizenship, and prohibits the abridgment of the privileges and immunities of the citizen. This, it may be said, is already in the constitution, and it is true, that instrument does, in effect, guaranty to the citizen, the enjoyment of life, liberty and property. But its provisions in that respect have been disregarded; State legislation in hostility to them has been tolerated and encouraged, and it is well to provide anew and with greater emphasis that the immunities of the citizen shall never be abridged nor his equal protection of the laws be denied."

SCHOOLS

Wisconsin does not appear to have made any distinction between whites and Negroes in the

⁷⁷ (Madison) Wisconsin State Journal, January 24, 1867, p. 2, col. 3.

⁷⁸ *Id.*, February 6, 1867, p. 2, col. 1.

⁷⁹ *Id.*, p. 2, col. 2.

field of education. The original State Constitution of 1848 provided that

The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable, and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years, and no sectarian instruction shall be allowed therein.¹

The school legislation of the State has been free of any reference to race or color.²

LEGAL STATUS OF NEGROES

The Constitution of 1848 limited suffrage to white males and to certain Indians.³ Eligibility for jury service was restricted by statute to qualified voters.⁴

In 1866, the Wisconsin Supreme Court held that Negroes were entitled to vote by virtue of a law enacted in 1849.⁵ *Gillespie v. Palmer*, 20 Wis. 544.

¹ Art. X, Sec. 3.

² See Chapter 19, Revised Statutes 1849; Chapter XXIII, Revised Statutes 1858; Chapter XXIII, Revised Statutes, 1871.

³ Art. III, sec. 1; see also, Wis. Rev. Stats., 1858, tit. II, c. 7, sec. 1.

⁴ Wis. Rev. Stats., 1858 and 1871, c. 118, sec. 1.

⁵ Wis. Laws, 1849, c. 137.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 1¹

OLIVER BROWN ET AL., APPELLANTS

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE
COUNTY, KANSAS, ET AL.

BRIEF FOR THE UNITED STATES ON THE FURTHER ARGUMENT OF THE QUESTIONS OF RELIEF

This brief is filed in response to the Court's invitation to the Attorney General of the United States to participate in the further argument of these cases on the questions of relief. It is now the settled law of the land that segregation of white and colored children in the public schools of a State or of the District of Columbia is unconstitutional. There remain for consideration and decision only the questions as to the decrees that should be entered in these cases in order to achieve compliance with the Court's ruling.

¹ Together with No. 2, *Harry Briggs, Jr., et al. v. R. W. Elliott, et al.*; No. 3, *Dorothy E. Davis, et al. v. County School Board of Prince Edward County, et al.*; No. 4, *Spottswood Thomas Bolling, et al. v. C. Melvin Sharpe, et al.*; and No. 5, *Francis B. Gebhart, et al. v. Ethel Louise Belton, et al.*

The views of the Government on these questions are set forth in this brief. At the outset it may be helpful to state, in summary fashion, our answers to the questions formulated by the Court (347 U. S. 483, 495-96) :

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice? *No.*

(b) or may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions? *Yes.*

5. On the assumption on which questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),

(a) should this Court formulate detailed decrees in these cases? *No.*

(b) if so, what specific issues should the decrees reach? ---

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees? *No.*

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and, if so, what

general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees? *Yes. The provisions suggested for inclusion in the decrees are outlined at pp. 27-29, infra.*

I

THIS COURT HAS FULL POWER TO DIRECT SUCH RELIEF
AS WILL BE MOST EFFECTIVE AND JUST

Question 4 need not detain the Court long. The Government, in its brief submitted on the previous reargument, reviewed the authorities bearing on the scope of the Court's remedial powers (Br. 152-167), and concluded that the Court has "undoubted power in these cases to enter such decrees as it determines will be most effective and just in relation to the interests, private and public, affected by its decision" (Br. 167). We noted that Congress has expressly empowered the Court, in fashioning effective relief in cases coming before it, to enter "such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances" (28 U. S. C. 2106). This provision reflects the breadth and flexibility of judicial remedies which are available to the Court. The shaping of appropriate relief in the present cases, as all will agree, involves considerations of a most sensitive and

difficult nature. But, as was stated in our earlier brief (p. 154), "we believe there can be no doubt of the Court's *power* to grant such remedy as it finds to be most consonant with the interests of justice."

II

THE VINDICATION OF THE CONSTITUTIONAL RIGHTS INVOLVED SHOULD BE AS PROMPT AS FEASIBLE

The fashioning of relief in these cases does not call for the formulation or application of new or unusual legal principles. On the contrary, the task confronting the Court is one which presents itself whenever it has been judicially found that legal rights have been, and are continuing to be, violated. The question is always one of determining how, in the light of the facts presented and within the limits of the power possessed by it, the Court can best insure the removal of the condition of illegality in a manner comporting not only with the interests of the parties but also, to the extent it may be involved, with the public interest.

In many instances the solution to this problem is quite simple. The balancing of the relevant considerations may lead inescapably to the conclusion that the legitimate interests of all concerned require only immediate termination of the unlawful conduct. In such circumstances a court of equity normally does no more than to enter a decree enjoining that conduct. It is where the

scales are not so clearly tipped in that direction that the shaping of the appropriate remedy involves difficulties.

The Court recognized, in restoring these cases to the docket for further argument (347 U. S. at 495), that "the formulation of decrees in these cases presents problems of considerable complexity." These problems must be viewed in proper perspective. The starting point must be a recognition that we are dealing here with basic constitutional rights, and not merely those of a few children but of millions. These are class actions. Under the Court's decision the maintenance of segregated schools is in violation of the constitutional rights not only of the individual plaintiffs but of all other "similarly situated" colored children upon whose behalf the suits were brought. Relief short of immediate admission to nonsegregated schools necessarily implies the continuing deprivation of these rights. The "personal and present" right (cf. *Sweatt v. Painter*, 339 U. S. 629, 635) of a colored child not to be segregated while attending public school is one which, if not enforced while the child is of school age, loses its value. Hence any delay in granting relief is *pro tanto* an irretrievable loss of the right.

The unconstitutionality of racial segregation in public schools is no longer in issue. However, in considering whether any delay in granting full relief is justifiable, it must be borne in mind that continuation of school segregation has harmful

effects both on the individuals concerned and on the public. The right of children not to be segregated because of race or color is not a technical legal right of little significance or value. It is a fundamental human right, supported by considerations of morality as well as law. "To separate [colored children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone" (347 U. S. at 494). Racial segregation affects the hearts and minds of those who segregate as well as those who are segregated, and it is also detrimental to the community and the nation.

In the absence of compelling reasons to the contrary, therefore, there should be no unnecessary delay in the full-vindication of the constitutional rights involved in these cases, and if any delay is required, it should be kept to a minimum.

III

THE PUBLIC INTEREST REQUIRES AN INTELLIGENT, ORDERLY AND EFFECTIVE SOLUTION OF THE PROBLEMS THAT MAY BE ENCOUNTERED IN COMPLYING WITH THIS COURT'S DECISION IN PARTICULAR AREAS

No objective examination of the problems of relief can overlook the fact that the impact of the Court's decision holding racial segregation in public schools to be unconstitutional goes far beyond the areas and parties involved in these cases. As a binding precedent the decision requires the termination of segregation in school

systems in more than one-third of the States and in the District of Columbia.

Because public education is, as the Court has recognized (347 U. S. at 493), "perhaps the most important function of state and local governments," there is a public interest to be served in permitting the transition to be carried out in an orderly manner, so as to avoid needless dislocation or other impairment of the effective operation of the school systems concerned. A prime consideration in dealing with the problems of desegregation must be that the systems of public education in the United States should not be adversely affected. Public education is one of the glories of the United States, and an indispensable source of its power. The richest resources of the United States are its citizens, and, as the Court has observed (347 U. S. at 493), education "is the very foundation of good citizenship."

It must be recognized that racial segregation in public schools is not a separate and distinct phenomenon. It is part of a larger social pattern of racial relationships. The Court's decision in these cases has outlawed a social institution which has existed for a long time in many areas throughout the country—an institution, it may be noted, which during its existence not only has had the sanction of decisions of this Court but has been fervently supported by great numbers of people as justifiable on legal and moral grounds. The Court's holding in the present cases that segregation is a denial of constitutional rights involved an

express recognition of the importance of psychological and emotional factors; the impact of segregation upon children, the Court found, can so affect their entire lives as to preclude their full enjoyment of constitutional rights. In similar fashion, psychological and emotional factors are involved—and must be met with understanding and good will—in the alterations that must now take place in order to bring about compliance with the Court's decision. The practical difficulties which may be met in effecting transition to nonsegregated public school systems should therefore be taken into account in determining the most effective means for ending school segregation in particular areas. The Court itself has recognized, in restoring these cases to the docket for further argument on the questions of relief, that these difficulties cannot be resolved by a single stroke of the judicial pen.

Broadly speaking, therefore, the decrees in these cases should be framed to require a transition which achieves the most expeditious compliance with the constitutional mandate and at the same time permits the intelligent, orderly, and effective solution of the problems that may be encountered in desegregating school systems in particular areas.

IV

THE NATURE AND EXTENT OF THE PROBLEMS THAT
THE DESEGREGATION OF PUBLIC SCHOOL SYSTEMS
MAY ENTAIL WILL VARY FROM AREA TO AREA

As the Court has noted (347 U. S. at 495), there is a "great variety of local conditions,"

which will undoubtedly affect the nature and extent of the changes in public school systems and practices required to bring about compliance with its decision. Without elaborating in detail the structure and organization of the educational systems of the States and the District of Columbia, it is not difficult to outline some of the kinds of problems which may arise in making a transition to nonsegregated systems.

1. The implementation of any program for the desegregation of public school facilities will be, of course, the responsibility of no single individual or administrative body. Indeed, of all governmental activities, education is undoubtedly the most decentralized, its administrative and financial base being shared between the states and their political subdivisions. And the extent of local participation is brought into perhaps sharper focus by the fact that of the approximately 120,000 governmental units tabulated by the Census Bureau in 1951, more than 70,000 were school districts.²

The division of authority between state and local school officials customarily is delineated by the state legislature. In most jurisdictions, the state board of education and school superintendent have the statutory duty of making the broad policy decisions affecting the state school system as a whole, enforcing state laws relating to the

² U. S. Department of Commerce, *Statistical Abstract of the United States* (1952), p. 355.

operation of schools and, in general, insuring that all school units meet certain minimal standards. Local authorities, within the framework of state educational policy as embodied in statutes, regulations and directives, exercise control over the intimate details of school management within their district or other operating unit.

The problems that will confront authorities on the state level thus will be principally ones of revising state laws and regulations which were tailored to fit the needs of a segregated school system. In South Carolina, for example, the statutory formula now employed in the distribution of state funds for teachers' salaries requires that minimum enrollment and average daily attendance in each district be determined separately for each race.³ In several jurisdictions, the law provides for school officials whose duties are limited to the supervision of Negro schools;⁴ in others, the legislature has provided for entirely separate Negro and white school districts encompassing the same area.⁵

³ South Carolina Code (1952), §§ 21-251, 290. Cf. D. C. Code (1951 ed.), §§ 31-1110, 31-1112.

⁴ See e. g., D. C. Code (1951 ed.), §§ 31-670, 31-671; Anno. Code of Maryland (Flack ed., 1951), Art. 77, §§ 42 (4), 208.

⁵ See e. g., Mississippi Code (1942 ed.) 6276. In some states separate Negro school districts are maintained even in the absence of a legislative requirement. In Delaware, for example, there are at least 42 such districts. It has been reported that at the next session of the Delaware General Assembly, legislation will be introduced to merge them with white school districts. See *Southern School News*, September 3, 1954, page 3.

2. Because local school authorities have considerable discretion respecting many facets of school administration, and because there is a wide variety in local conditions, it can be expected that, even within the same state, no two school districts will be faced with precisely the same problems in accomplishing an effective transition to nonsegregated school systems.

(a) In districts where there is more than one school, adjustments in the method employed for allocating students to particular schools may have to be made. In the majority of such districts, children are given little, if any, choice as to the school they are to attend. Instead, each school in the district is assigned a particular attendance area and the pupil must enroll in the facility within whose attendance boundaries he resides.

Many factors are taken into consideration in drawing these boundaries, foremost among them being the size and character of the school, the geographical distribution of the school population in the district, and the ease and safety of public travel to and from school. In the case of segregated school systems, boundaries are formulated separately for white and colored facilities, with the result that the overall objective of making the maximum use of total school facilities and minimizing travel difficulties is seldom achieved. Changes in the racial character of a neighborhood frequently cause overcrowding in some schools while others operate at far below capacity.

Similarly, children of both races are often compelled to travel long distances to reach the segregated schools to which they are assigned.

The extent of the boundary alterations required, in the reformulation of school attendance areas on a non-racial basis, will vary. This is illustrated by the recent experience in the District of Columbia in recasting attendance boundaries on a wholly geographical basis. In the neighborhoods where there is little or no mixture of the races, and where school facilities have been fully utilized, it was found that the elimination of the racial factor did not work any material change in the territory served by each school. In biracial neighborhoods, however, the objective of securing maximum utilization of facilities, on a non-racial basis, could be achieved only by making radical revisions in the area covered by the formerly Negro and white schools.

In connection with the formulation of new attendance boundaries, school districts may be called upon to review or alter prevailing practices regarding pupil transfers. Because it is almost impossible to fix boundaries which do not work a hardship on any pupils, many communities now permit enrollment outside the attendance area of residence in exceptional circumstances. Pupils on the secondary school level occasionally are allowed to attend a school at a distance from their homes because it offers courses of instruction not otherwise available. Specialized needs of

mentally or physically handicapped children may cause them to be grouped together for instructional purposes. And pupils not possessing an adequate knowledge of the English language sometimes are placed in separate schools until that knowledge is acquired. While the allowance of transfers and special assignments for reasons of this character is fully warranted and undoubtedly will be continued, some districts may be confronted with efforts by students to attend schools in other areas for the sole and unjustifiable purpose of avoiding enrollment in a bi-racial facility.

(b) At the same time that procedures are devised for the assignment of pupils to schools on a basis not involving distinctions of color, some districts may have to readjust the use of their facilities. In low population rural areas now maintaining two schools solely by reason of the dual system, educational and economic considerations may dictate consolidation. There are several ways in which this consolidation might be accomplished. Where existing structures are small or otherwise inadequate, a new school might be constructed to accommodate all children. Another solution might be to close one of the schools and transfer its pupils to the other.

In areas where there is a considerable disparity in the quality and curricula of the former white and Negro schools, the problem of readjustment may be more troublesome. Parents will

be understandably reluctant to send their children to schools markedly inferior to those previously attended, or which do not provide courses of instruction that would have been begun or continued if no transfer had been required. While the long-range answer to a substantial part of this problem may be the improvement of substandard schools, or the construction of new ones, school administrators may have to devise stop-gap methods—not involving continuation of racial segregation—to protect the interests of children now in school.

(c) Teachers may have to be reassigned and changes made in the method of their selection, with due regard to the safeguarding of seniority and tenure rights. In areas which now have separate eligibility lists for white and colored teachers, new lists combining applicants of both races may be established.⁶ Salary differentials

⁶ This step was taken in both the District of Columbia and in Baltimore. In the former, under the segregated system, Negro and white applicants for teaching positions took separate examinations conducted by separate boards of examiners. Performance on these qualifying examinations determined position on the eligibility lists maintained for applicants of each race and the lists in turn provided the sole basis of appointment. In June 1954, the boards of examiners were merged into a single board under the direct chairmanship of the superintendent of schools, teacher examinations were held on an integrated basis for the first time, and eligibility lists were consolidated. For each level of

may have to be eliminated.⁷ And, on the supervisory level, in communities maintaining separate supervisors for Negro schools a general realignment of duties may be necessary.⁸

(d) Most rural and some urban areas provide transportation to and from schools. Communities which have maintained separate transportation facilities for the two races may have to reorganize schedules and routes. And some localities may discover that there will be a need

instruction, there is now but a single list on which no reference is made to the race of any of the named individuals.

In Baltimore, the compilation of separate lists involved not only the grade received on a written examination, administered to white and colored alike, but in addition the results of an oral interview and the evaluation of the applicant's previous experience. In combining the lists, Baltimore did not disturb these criteria; nor was a change made in the established practice of selecting any one of the five highest ranking qualified individuals to fill a vacancy.

⁷ In 1952, the average annual salaries of white and Negro classroom teachers in 12 Southern states were \$2,740 and \$2,389, respectively. A part of this differential may be explained by the fact that the average amount of college training possessed by the white teachers was slightly higher. And between 1940 and 1952, the gaps in both salary and training averages were substantially diminished. See Ashmore, *The Negro and The Schools* (1954), pp. 158-159.

⁸ Baltimore's dual system, for example, had five assistant school superintendents serving on a systemwide basis and one assistant superintendent for Negro schools.

for additional vehicles or, conversely, that less equipment will be necessary.⁹

(e) A few school districts may have to compensate for differences in the educational backgrounds of newly integrated pupils. In localities where the segregated Negro facilities were inferior, colored students may find it difficult to pursue satisfactorily the same studies as white students in the same grades. School authorities faced with that problem may desire to give tests to determine the grade to which each student should be assigned. Or such tests might be employed for the purpose of selecting students for additional and intensified instruction in subjects in which they are deficient.

3. Because, as has been noted, the responsibility for the financial support of public education is distributed between the state and its subdivisions, the economic burdens incident to the implementation of integration also will fall upon several levels of government. These burdens, however, will flow largely from the present inequality, in a physical sense, of separate Negro schools. As a consequence, even if the dual system were to continue, many areas would be faced

⁹The requirement of additional equipment will be generally restricted, of course, to places where present facilities have not been sufficient to provide adequate transportation for all pupils. It cannot therefore be regarded as, in any real sense, a problem arising from the elimination of segregation.

with the necessity of making substantial outlays for capital improvements.

Indeed, the financial cost of an "equalization" program for separate schools unquestionably would be far greater. No matter how small the Negro population in the particular area, it would have to be provided with facilities and equipment equivalent in all respects to those provided in white schools. In similar circumstances, a non-segregated school system may find that the educational needs of all children will be satisfied by merely closing down the former Negro school and transferring its pupils to other facilities.

While, placed in perspective, economic considerations would seem to furnish less of an obstacle to the maintenance of integrated schools than to "separate but equal" schools, it should be noted that if expenditures per classroom unit are to be continued at current levels for white children, an additional annual expenditure of over 160 million dollars will be required in the states involved and the District of Columbia. In respect to pupil transportation services, the estimated capital outlay is 40 million dollars. And the estimated cost of "equalizing" Negro schools is in excess of two billion dollars.¹⁰

4. In addition to problems of a purely administrative or fiscal character, school authorities

¹⁰ These estimates have been furnished by the Office of Education, U. S. Department of Health, Education and Welfare.

may have to cope with a certain amount of popular hostility towards the elimination of segregation in public schools. This results from the fact that in each of the areas involved the dual system has existed for generations and is accepted by many as being a part of the "way of life" of the area. And the fear has been expressed in some quarters that the opposition to any departure from the existing pattern will manifest itself in the withdrawal of state aid to education and in other action on state and local levels designed to prevent or impair the effective operation of public schools on a nonsegregated basis.

We do not believe that there is warrant for presuming that responsible officials and citizens will tolerate violations of the Constitution.¹¹ The solutions to these problems, like all others in a democracy, will emerge from the "sober second

¹¹ The well-publicized student disturbances which occurred recently in some localities certainly provide no basis for such a presumption. For one thing, these disturbances were isolated; in the overwhelming majority of the areas which have begun or completed compliance with this Court's decision, the adjustment has been remarkably free of untoward incident. Moreover, it appears to be the fact that the misconduct was in substantial measure incited by a small number of reckless and irresponsible individuals and groups, many from without the community, who took full advantage of some students' immaturity. And, as is so often true in such circumstances, where school and law enforcement authorities made clear their determination neither to countenance nor to capitulate to lawlessness, the disturbances ended as abruptly as they had started.

thought of the community, which is the firm base on which all law must ultimately rest." (Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 25.) Popular hostility, where found to exist, is a problem that needs to be recognized and faced with understanding, but it can afford no legal justification for a failure to end school segregation. Racial segregation in public schools is unconstitutional and will have to be terminated as quickly as feasible, regardless of how much it may be favored by some people in the community. There can be no "local option" on that question, which has now been finally settled by the tribunal empowered under the Constitution to decide it.¹²

While general community hostility cannot serve as justification for avoiding or postponing compliance with the constitutional mandate, it is relevant in determining the most effective method for ending segregation in the particular

¹² "That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges." *Buchanan v. Warley*, 245 U. S. 60, 80-81.

In any event, this would not be the proper occasion or time to adjudicate possible attempts to evade or circumvent this Court's decision. Such questions, like all other questions of constitutional law, must be resolved when they arise concretely, in a factual setting, and when this Court can have the benefit of findings of fact and the judgment of the lower courts.

locality. School administrators will have an obvious concern in obtaining public support and acceptance of the transition. The extent of the difficulties which may be encountered will depend, of course, upon the state of local opinion, which in turn is influenced by such varied factors as the economic structure, geographical location, and relative numbers of whites and Negroes in the community. There is, however, a general recognition of the need for thoughtful advance preparations to resolve the problems of desegregation with as few disruptions as possible. If any lesson can be derived from past experiences in ending segregated school systems, it is the importance of public confidence in the ability of school administrators to accomplish the adjustment without, in the process, losing sight of or sacrificing the basic and continuing educational needs of all the children affected.¹³

¹³ In presenting his program for integration for the approval of the Board of Education, the Superintendent of Schools of the District of Columbia laid emphasis on the consideration of the educational growth and welfare of the school child. Thus, in justification of the proposal that each presently enrolled pupil be granted a limited option to remain in the school he now attends even though he does not reside within its new attendance boundaries, the Superintendent enumerated the ways in which this would provide "stability, continuity and security in the educational experiences of pupils during the transition period." (See brief for respondents in No. 4, p. 13.)

While we do not describe the District of Columbia pro-

In some areas it may be found advisable to preface the desegregation process with programs, not extending for more than a few months, designed to promote interracial understanding among students, teachers, and parents. Such preparatory measures were taken in many of the localities which have abolished segregated school systems in recent years. In one New Jersey community, for example, funds were appropriated to allow several selected teachers to attend a special workshop on human relations conducted at a state university. In addition, an extension course on the same subject was offered by school authorities during the year preceding desegregation and was well attended by teachers. In other areas civic, P-TA, religious, and fraternal groups took the initiative in establishing a favorable climate for making the transition. It was found that the efforts of these groups were instrumental in reducing many of the pre-existing racial tensions in the community, with the result that

gram in detail here, since this is undertaken in the brief for respondents in No. 4, we think it reflects credit upon those responsible for its formulation and execution. In every significant respect, the plan evidences painstaking care on the part of school officials to realize the expressed objective of an expeditious transition calculated "to make the best use of the total resources of the school system in plant and personnel, to serve the best interest of all the pupils, and to promote the general welfare of the community." (See brief for respondents in No. 4, p. 11.)

integration was accomplished speedily and with little or no serious friction or incident.¹⁴

V

THE FORMULATION AND EXECUTION OF PROGRAMS FOR TRANSITION TO NONSEGREGATED SCHOOL SYSTEMS SHOULD BE UNDERTAKEN BY THE RESPONSIBLE SCHOOL AUTHORITIES UNDER THE SUPERVISION OF THE COURTS OF FIRST INSTANCE

For the reasons which have been summarized, it is clear that no single formula or blueprint is readily susceptible of application to all localities which must end segregation in their school systems. The measures essential to bringing about an expeditious, orderly, and effective transition in any given area will depend on the special conditions and problems in that area. And since there is wide variance in local conditions, what may be practicable in one community may be wholly inappropriate in another.

A prerequisite to the formulation, initiation, and supervision of any practicable program for ending segregation is a knowledge of the special problems and needs of the particular community. It is the responsible school authorities and the courts of first instance in each area who will have the greatest familiarity with local conditions and

¹⁴ The transitional experiences of twenty-four communities in six states which within the past ten years desegregated their public school systems are the subject of a study conducted under the auspices of the Fund for the Advancement of Education of the Ford Foundation. Williams and Ryan, *Schools in Transition* (1954).

who will be in the best position to evaluate their significance and effect in accomplishing desegregation in as short a period as feasible. For this reason, this Court should not, either itself or with the assistance of a special master appointed by it,¹⁵ delineate the precise steps that each of the defendants should take in ending segregation in the public school systems. Instead, the primary responsibility for both devising and carrying out programs for the expeditious accomplishment of the required transition should be placed upon the defendants, to be exercised under the continuing direct supervision of the district courts or appropriate state courts.

This Court, we believe, should lay down standards for the guidance of the lower courts in carrying out its decision. A remand for further proceedings, without more, would add to the uncertainty and doubt which already exist and would only serve to make the process of adjustment more difficult.

Specifically, the lower courts should be instructed to require the defendants either to admit

¹⁵ While we do not believe that the Court should appoint a special master to hear evidence, there can be no question of its power to do so. In the 1948 revision of the Judicial Code, Congress expressly repealed R. S. 698 [28 U. S. C. (1946 ed.) 863] which had provided that "[u]pon the appeal of any cause in equity, * * * no new evidence shall be received in the Supreme Court." Act of June 25, 1948, c. 646, § 39, 62 Stat. 992. We find nothing to suggest that the legislative purpose was other than to remove the restriction entirely.

the plaintiffs, and other Negro children similarly situated, forthwith to public schools on a non-segregated basis or to propose promptly, for the court's consideration and approval, an effective program for accomplishing the transition as soon as practicable. In passing upon the acceptability of proposed programs, the criterion should be whether the defendants have sustained the burden of showing that their particular program will bring about the total elimination of racial considerations in the admission of pupils to public schools as rapidly as local conditions allow. And in determining whether the projected plan represents the most expeditious means of accomplishing an effective transition, the courts should be permitted to take into account the scope of the administrative adjustments that are called for and the particular conditions existing in the community. Where there are no solid obstacles to desegregation, delay is not justified and should not be permitted. It is only where the lower court finds, upon clear and convincing evidence, that the defendants have met the burden of showing that immediate (i. e., at the beginning of the next school term) completion of the desegregation program is impracticable, that any delay is justifiable. And, in such a situation, the district court should fix the shortest practicable period for completing desegregation.

Although it would be helpful if this Court could

specify outside limits for the period of desegregation, we do not think it would be feasible to do so at this time. Apart from the fact that there is no way of judging at this point what integration will involve in the particular area, maximum periods tend to become minimum periods. This Court should not enter any order which might have the practical effect of slowing down desegregation where it could be swiftly accomplished. The Court, however, should make it clear that any proposal for desegregation over an indefinite period will be unacceptable, and that there can be no justification anywhere for failure to make an immediate and substantial start toward desegregation, in a good-faith effort to end segregation as soon as feasible.

Further, the lower courts should be instructed to be insistent that any interval permitted for the accomplishment of desegregation is being fully utilized. Any period during which little or nothing is being done to further the transition would serve no useful purpose and, indeed, would only intensify the difficulties. Whether time will be useful will depend on how it is used; delay solely for the sake of delay is intolerable. Where a period of time is allowed for transition, it should be for the sole purpose of enabling necessary constructive measures to be taken, and not for the purpose of permitting postponement *per se*.

If the program for desegregation formulated by the defendants will remove, as expeditiously as possible, state-imposed or state-supported racial classifications of pupils in public schools, the lower courts should not substitute their judgment respecting the administrative features of the program for that of the school authorities. The Constitution prohibits the maintenance of segregated school systems. It does not compel the adoption of any specific type of nonsegregated system. The decisive inquiry is whether race or color has been entirely eliminated as a criterion in the admission of pupils to public schools. The essence of the Court's decision in these cases is that there be no governmental action which enforces or supports school segregation.

This Court, we believe, should not in its present decrees give blanket approval to any particular programs for desegregation. The determination of the necessity for, and constitutionality of, any specific plan should not be made *in vacuo*. Flexibility in responding to developing circumstances may become important. The experience in carrying out a plan, once it is begun, may alter the assumptions on which it was based. For example, it may develop, after a plan is in operation, that it can be carried out more quickly than was anticipated at the outset, as has been demon-

strated by the experience in the District of Columbia.

VI

THE CASES SHOULD BE REMANDED TO THE LOWER COURTS WITH DIRECTIONS TO CARRY OUT THIS COURT'S DECISION AS RAPIDLY AS THE PARTICULAR CIRCUMSTANCES PERMIT

For the reasons outlined above, the Government suggests that the Court should enter decrees (a) declaring that racial segregation in public schools is unconstitutional and that all provisions of law requiring or permitting such segregation are invalid, and (b) remanding the cases to the appropriate courts of first instance for such further proceedings and orders as are necessary and proper to carry out this Court's decision.¹⁶ The decrees should contain specific provisions substantially as follows:

(1) That the lower court shall forthwith enter orders directing the defendants to submit within 90 days a plan for ending, as soon as feasible, racial segregation of pupils in public schools subject to their authority or control.

¹⁶ In the Delaware case, No. 5, *Gebhart v. Belton*, the Attorney General of Delaware, in his brief for petitioners (pp. 17-18), now agrees that the judgment of the state Supreme Court should be affirmed. Accordingly, since the respondents did not file a cross-petition for certiorari, it would appear that in the Delaware case this Court should simply enter an order of affirmance.

(2) That, unless a satisfactory plan is submitted to and approved by the lower court, it shall forthwith enter appropriate orders, by way of injunction or otherwise, directing admission of the plaintiffs and other children similarly situated to nonsegregated public schools at the beginning of the next school term.

(3) That, upon submission of a plan by the defendants, the lower court shall promptly hold a hearing to determine whether it provides for transition to a nonsegregated school system as expeditiously as the circumstances permit. The defendants shall have the burden of proof on the question of whether, and how long, an interval of time in carrying out full desegregation is required. In approving any proposed program, the court shall make such modifications as may be required, and shall fix the earliest practicable date for completion of the program. And no program shall be sanctioned which does not call for the immediate commencement of the procedures necessary to the accomplishment of the transition.

(4) That during the period, if any, allowed for completion of the program for transition to a nonsegregated system, the lower court shall require the defendants to submit detailed periodic reports showing the progress made in ending segregation. The court shall enter such fur-

ther orders as may be required from time to time in order to insure against unnecessary delay in the execution of the program.

(5) That this Court shall retain jurisdiction for the purpose of making such further orders, if any, as may become necessary for carrying out its mandate. To this end the lower courts should be required to submit information reports to this Court at specified intervals showing in detail the actions taken in bringing about compliance with the requirements of the Constitution. (The Court may wish to appoint a special master to review such reports and to make appropriate recommendations thereon to this Court and to the lower courts.)

CONCLUSION

The responsibility for achieving compliance with the Court's decision in these cases does not rest on the judiciary alone. Every officer and agency of government, federal, state, and local, is likewise charged with the duty of enforcing the Constitution and the rights guaranteed under it. And, ultimately, it is the obligation of every citizen to respect and abide by the law, once it is authoritatively declared. We have no doubt that the American people and the officials through whom they act will meet these responsibilities

in the spirit, to quote the words of the President, of "patience without compromise of principle."¹⁷

Respectfully submitted.

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¹⁷ New York Times, June 30, 1954, p. 19.